86-106

Supreme Court, U.S.
FILED
JUL 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. A-964

In The Supreme Court
of the United States

October Term, 1985

William Harold Kelley,
Petitioner,

-against-

The State of Florida,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Florida

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Florida Supreme Court applied a constitutionally impermissible standard in assessing whether the State's destruction of all of the real evidence in the case deprived petitioner of a fair trial.

II. Whether the admission of third party testimony purportedly as a prior consistent statement where the declarant denied making the statement violated petitioner's constitutional rights to due process and confrontation.

III. Whether in this case the death penalty constitutes cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments.

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JURISDICTION OF THE COURT

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3). The judgment sought to be reviewed is a judgment of the Supreme Court of Florida dated April 10, 1986, which affirmed, by written opinion (A-1), a judgment of conviction and sentence entered against the Petitioner by the Circuit Court in and for Highland County, Florida on April 2, 1984.

By order dated June 11, 1986, Associate Justice Lewis F. Powell, Jr. granted Petitioner's motion for an extension of time to file the Petition for a Writ of Certiorari to and including July 9, 1986. (A-31)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

AMENDMENT XIV

Section 1. ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial,...to be confronted with the witnesses against him....

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

6C FLA. STAT. ANN. §90.801 (WEST 1979)

90.801 Hearsay; definitions; exceptions (2) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is: (b) Consistent with his testimony and is offered to rebut an express or implied charge against him of improper influence, motive, or recent fabrication.

23 FLA. STAT. ANN §921.141 (WEST 1985)

921.141. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(1) Separate proceedings on issue of penalty.-- Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s.775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the

penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the

Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury.-- After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) Findings in support of sentence of death.-- Notwithstanding the recommendation of

a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the

findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s.775.082.

(4) Review of judgment and sentence.-- The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances.-- Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committd to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) Mitigating circumstances.-- Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

STATEMENT OF THE CASE

This case raises the terrifying possibility that an innocent man stands convicted and sentenced to death because the court clerk ran out of storage space. In 1981, fifteen years after the murder of Charles Von Maxcy, Petitioner William Kelley was indicted for the crime. He has been convicted and sentenced to death. No physical evidence linked him to the slaying. Indeed, all physical evidence of the crime had been destroyed by the State years earlier, because the clerk claimed he needed the space. The State's case against Kelley rested entirely on the testimony of one John Sweet, who in the late 1960's had himself been tried twice for masterminding the Maxcy murder.

Kelley's first trial, at which Sweet testified, ended in a hung jury. At Kelley's second trial Sweet was again the star witness.

The trial court permitted Sweet's doubtful credibility to be bolstered through introduction of a series of a "prior consistent statements" allegedly made by Sweet about Kelley's involvement in the crime -- which, if believed, would be higly incriminating. But Sweet himself adamantly denied having made these "prior consistent statements." Petitioner, who has always maintained that he was not involved in the murder, was convicted at the second trial after the second jury's deadlock was broken by a verdict-urging charge. Despite the weaknesses in the State's case, he stands sentenced to death.

FACTS

Twenty years ago, on October 3, 1966, Charles Von Maxcy was murdered in his home in Sebring, Florida. He had been stabbed several times and shot in the head.

Sweet, who had been involved in an illicit love affair with Maxcy's wife, (Irene) was charged with the murder soon after it occurred. It was the state's contention that Sweet had arranged for the murder of Maxcy so that he (Sweet) and Irene could live together on what Irene would inherit upon Maxcy's death. The State contended then and at all times thereafter that, through an intermediary, Andrew Von Etter and the Petitioner were hired to kill Maxcy and that they in fact did so.

Lacking evidence to support its theory that Kelley and Von Etter were involved, the State proceeded against Sweet alone. Sweet's first trial resulted in a hung jury. He was tried again, and convicted, but the conviction was reversed on appeal.[1]

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[1]The appeals court ruled that cross-examination of the state's key witnesses, one of whom was Irene Maxcy, had been improperly (footnote continued)

Although the appeals court remanded for a new trial, the State declined to retry Sweet. In 1971, Sweet's motion for discharge (Record on Appeal to the Supreme Court of Florida [hereinafter "RA"] at 1204-05) was granted, the State having indicated that inability to obtain necessary witnesses made it impossible to try the case again. (State's Response to Motion for Discharge, RA 1170-71)

Although it was still the State's contention that Von Etter and Kelley were the actual contract killers, and although there is no statute of limitations for murder in Florida, in April of 1976, on the request of the court clerk, the State petitioned the court for an order permitting disposal of the evidence adduced at Sweet's trial, on the ground that "this cause had been disposed of."

(footnote continued from previous page) curtailed. See Sweet v. State, 235 So.2d 40 (Fla. 2d D.C.A.), cert. denied, 239 So.2d 267 (Fla. 1970).

(Petition for Disposal of Evidence, RA 1172) The order was signed by a judge and the State's exhibits -- including the .38 caliber bullet found near Maxcy's body; a bloody sheet which the State contended was placed over Maxcy's body before he was stabbed and which, according to the prosecutor, explained why Von Etter and his companion were not bloodstained when seen shortly after the crime; a piece of the victim's shirt; and two handwritten statements by Sweet -- were destroyed. (RA 1206-08) Also unavailable through loss or destruction was other evidence accumulated in the course of the murder investigation, including hair samples, fingernail scrapings, blood samples and scrapings, carpeting from the Maxcy home, and a brake pedal and floor

mat from the victim's car which the killers were supposed to have used after the killing. (See Supplemental brief of Appellant at 2)[2]

There matters stood until 1981 when Sweet approached Massachusetts law enforcement authorities seeking assistance in exchange for information he purportedly had about a variety of crimes, including the Maxcy murder. In December of 1981, 15 years after the crime, Petitioner was indicted and charged with Maxcy's murder based on Sweet's testimony about the planning and execution of the scheme.

By pre-trial motion, the defendant moved to dismiss the indictment on the ground that the State's destruction of the physical evidence in the case, and the 15 year delay

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[2]Defendant made a pre-trial request for Brady material. (Defendant's Demand for Discovery, RA 1050) The prosecution maintained that there was none. (Response to Demand for Discovery, RA 1052)

between the crime and the indictment, made defense of the case impossible and violated Petitioner's right to due process of law. (Defendant's Motion to Dismiss Indictment, RA 1034-36; Defendant's Motion to Bar Prosecution and Dismiss Indictment, RA 1108-12) The motions were denied. (Transcript on Appeal, Vol. 1, 78-80, 105)

The case went to trial with Sweet as the State's chief witness. The jury declared itself unable to reach a verdict, and, although a verdict-urging instruction was given, no verdict was reached and a mistrial was declared.

Petitioner's second trial began in March of 1984. Sweet, the admitted mastermind of the Maxcy murder, was again the State's key witness. Having been granted immunity for that murder, for the perjury he had committed in the course of his two previous trials for

that crime, and for a host of other crimes including breaking and entering, narcotics crimes, larceny, arson, bribery, bookmaking, giving false statements to police, and ownership of counterfeiting plates, he testified that, on Irene Maxcy's urging, he contacted one Walter Bennett to arrange for Maxcy's murder. Bennett quoted a price of $20,000 for the job -- $5,000 front money and the balance after the job was completed; Sweet paid the front money.

Thereafter, Von Etter met with Sweet in Florida. Sweet showed Von Etter the Maxcy's home and gave him a description of Maxcy.

The evening before the murder, Sweet testified, he received a call from Von Etter who reported that his "friend" was there and that the killing would occur the following

day. Sweet arranged to meet Von Etter at a Sebring shopping center the following afternoon.

According to Sweet, Von Etter and another man arrived at the shopping center as agreed. According to Sweet, a "big fellow" came over to his car and proclaimed, "I'm Bill Kelley. I'm here to kill Von Maxcy."

Von Etter, Sweet, and according to Sweet, Petitioner, drove to Maxcy's house. Sweet testified that, on arriving there, Petitioner, who was wearing a "glove on one hand," opened his satchel to display several knives and revolvers. Sweet testified that he left the scene.

Sweet stated that he paid Bennett and Von Etter the remaining $15,000 in Boston several weeks later. He also testified that two or three years later, he returned to Massachusetts, ran into Bennett's wife, and

learned Kelley's address from her. He went to that address, left his telephone number, and later Kelley contacted him. According to Sweet, Kelley and he met and Kelley told him what had happened at the Maxcy house. According to Sweet, Kelley told Sweet, "Boy, he was a powerful guy. I stabbed him three or four times and he kept coming after us, so I had to shoot him in the head."

On cross-examination, Sweet testified that the first time he had told anybody about his involvement in the Maxcy murder was in February 1981 when he spoke to the police in Massachusetts. Specifically, he denied vigorously and repeatedly having admitted his involvement to Abe Namia, a private investigator hired by Sweet's defense attorney to assist him at the time of Sweet's own trials for the Maxcy murder.

Nevertheless, and over defense objection to this prejudicial and inadmissible hearsay, Namia was permitted to testify as the State's final witness. (Transcript on Appeal, Vol. 5, 764-65) He testified that he had met Sweet before Sweet's first trial when he was employed by Sweet's attorney as an investigator. He testified that Sweet had accompanied him to Boston and had shown him Kelley's residence. According to Namia, during this trip, Sweet had told him all about the Maxcy murder, including Kelley's involvement in it. Namia claimed that he had

told Sweet's lawyer, deceased at the time of Kelley's trial, what Sweet had told him about his and Kelley's involvement. Namia claimed he was "absolutely sure" that he had written extensive notes about this trip, specifically including what Sweet had told him and that he had given those notes to Sweet's lawyer. But when his reports were located by the defense at the warehouse where Sweet's attorney's records were stored, they contained not a single word about anything Sweet had allegedly told him during the trip.

No physical evidence connected Kelley to the crime. No identification evidence placed him at or near the crime scene.[4] Thus, the

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[4]It was not disputed that someone using the name "Bill Kelley" was in Florida with Von Etter on October 3, but Petitioner maintained it was not he.

The then 17 year old daughter of the manager of the Daytona motel where Von Etter and "Bill Kelley" stayed described "Bill Kelley" as a 40 year old man; Petitioner was

(footnote continued)

State's case against Kelley rested entirely on Sweet's credibility.

After some deliberations, the jury returned and reported that it was at an impasse. The court gave a verdict-urging instruction, which went well beyond the approved Florida instruction, and beyond the ultimately unsuccessful verdict urging instruction given when Kelley's first jury reported itself deadlocked.

Thereafter, the jury sent a question to the judge, asking whether Sweet had received immunity in Florida for first degree murder and perjury before providing information in

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(footnote continued from previous page) 23 in 1966. Her description of "Bill Kelley" did not match the Petitioner's description. She was not asked to and did not identify the Petitioner. Similarly, Von Etter's widow testified that on October 4 she had driven back to Massachusetts from Florida with Von Etter and "Bill Kelley," whom she had not met prior to this trip to Florida. She too was not asked to, and did not, identify Petitioner.

the Maxcy case, and if he had anything to gain by his testimony. (Transcript on Appeal, Vol. 6, 925) Although the record was clear that Sweet had received immunity for those crimes, the trial judge declined to answer the question or to read back any or all of Sweet's testimony. Rather, the court advised the jurors that they could request that testimony be read back to them if they could designate with precision what testimony they wanted to have read back and if the testimony requested was not too lengthy. The jury made no further request.

The jury thereafter returned with its guilty verdict. (Id. at 937) After a further brief hearing before the jury, the jury rendered, by a vote of 8-3, an advisory sentence recommending that the death penalty

be imposed. (Id. at 985) The judge then sentenced Kelley to be put to death. (Id. at 1007)[5]

The Supreme Court of Florida affirmed the conviction and the death sentence. It rejected Petitioner's claim that the State's intentional destruction of the real evidence of a crime committed in 1966 violated Petitioner's due process rights. (A-6) In

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[5]The trial court's findings of fact are set forth in the Appendix at A-20. The trial court found three statutory aggravating circumstances. First, the murder was committed for pecuniary gain. Second, it was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification. Third, Kelley was "previously convicted of a felony involving the use or threat of violence to the person, in that he was convicted of conspiracy to rob in the state of Massachusetts in 1959, and on the same date convicted of robbery." The record discloses no more about that crime than that it was committed 25 years earlier, when the defendant was less than 17 years old and involved $114 and a six-pack of beer. (Transcript on Appeal, Vol. 6, 956, 972) The court found no statutory mitigating and one non-statutory mitigating factor: none of the others involved in the crime had received punishment. (Id. at 1001)

reaching its conclusion the court employed a "variable standard analysis" "balancing any negligent or culpable conduct of the prosecutor with any prejudice resulting to the defendant from the destruction of the evidence." (A-5) Calling the destruction of the evidence in this case "unfortunate" and announcing itself "extremely hesitant to condone the State's behavior," the Court concluded that its acts were not negligent in light of the fact that the State did not have sufficient evidence to proceed against Kelley until Sweet offered his testimony in 1981 and the destruction of the evidence took place nearly nine and one-half years after the state's efforts to convict Sweet and five years before Kelley's indictment.

The Court also concluded that

> The State has met its burden of establishing lack of prejudice to the appellant's case. Phrased alternatively, we find

> that appellant has failed to justify a reversal of his conviction.

(A-6)

In so concluding, the Court explicitly deferred to the "findings of the trial court," contending that "the court below specifically found that the destruction of the particular evidence here in question did not prejudice appellant's case, or create an otherwise non-existent reasonable doubt." Id. The record establishes however, that the trial court made no such findings.[6]

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[6]We have combed the record and found no such ruling by the trial court. The trial court's ruling on the matter is an oral ruling made prior to trial denying the pre-trial motion to dismiss the indictment. (Transcript on Appeal, Vol. 1, 78-80) That ruling is set forth, in its entirety, at A-16-19, and could not possibly have been an evaluation of the destroyed evidence in the context of the case, for the trial had not yet begun. The trial court again made reference to the evidence which had been destroyed in rejecting the defendant's contention in the penalty phase that the destruction of the evidence should be considered a mitigating circumstance. The
(footnote continued)

The Court also found no error in the admission of Namia's testimony as prior consistent statements of Sweet to rebut an inference of recent fabrication or improper motive established through Sweet's cross-examination. (A-7) Ignoring entirely Petitioner's contention that, because Sweet had denied making any such statements to Namia, the statements could not serve the purpose for which they were offered, that is, to rehabilitate an impeached witness, the Court, again deferring to the discretion of the trial court,[7] found that the Petitioner

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(footnote continued from previous page)
court stated only "the missing evidence did not affect or cloud the issues sufficiently to be treated as a mitigating factor." (Transcript on Appeal, Vol.6, 1006)

[7]The deference is again unjustified by the record for the trial judge, ruling on the defense motion in limine to exclude Namia's testimony, said only:

> "I am going to deny the motion. After all, we don't want to
>
> (footnote continued)

had not been prejudiced by Namia's testimony. It made this finding even though Namia's recollection of Sweet's statements to him included details of the scheme which went beyond those given by Sweet in his trial testimony.[8]

The Court summarily rejected (A-13) Petitioner's challenges to the imposition of the death penalty and to the statute's constitutionality. (See Brief of Appellant, 63-79)

(footnote continued from previous page)
deny Mr. Kunstler [defense counsel] his fun with the witness."

(Transcript on Appeal, Vol. 5, 765)

[8]The Court also rejected Petitioner's challenge to the instruction given to the deadlocked jury; the trial court's refusal to answer the jury's inquiry as to whether Sweet had been given immunity; the trial court ruling allowing the jury to take notes during the trial; the admission of certain post-arrest statements of Kelley indicating awareness of the murder; and Petitioner's claim of ineffective assistance of counsel. (See A-8-13)

REASONS FOR GRANTING THE WRIT

POINT I

THE FLORIDA SUPREME COURT APPLIED A CONSTITUTIONALLY IMPERMISSIBLE STANDARD IN ASSESSING WHETHER THE STATE'S DESTRUCTION OF ALL OF THE REAL EVIDENCE IN THE CASE DEPRIVED PETITIONER OF A FAIR TRIAL

1. Introduction

Petitioner, William Harold Kelley, who has consistently proclaimed his innocence, was unable to prepare and present an effective defense to capital charges of murder. He was fatally crippled by a combination of government-created handicaps, including the government's intentional destruction nine and a half years after the murder and five years before his indictment, of all of the real evidence relating to the murder, an 18-year delay between the crime and the trial, and the government's exploitative use of the missing evidence against him at trial. Recognizing

that the "serious constitutional rights" involved in this case raise "grave concerns as to fairness," the Florida Supreme Court aptly termed this case "highly unusual," indeed, "a case of first impression." In rejecting Petitioner's appeal, however, the Supreme Court of Florida employed an unconstitutionally stringent standard to evaluate Petitioner's destruction of evidence claims, one which permitted it to avoid any specific consideration of the impact of the destroyed evidence on the trial. Because the totality of the circumstances here are clearly "sufficient to undermine confidence in the outcome" of Petitioner's trial, United States v. Bagley, 105 S.Ct. 3375, 3384 (1985), the conviction should be reversed.

2. The Supreme Court of Florida Applied an Unconstitutionally Stringent Standard in Evaluating Petitioner's Destruction of Evidence Claim.

In reviewing a claim that lack of access

to exculpatory evidence deprived a defendant of due process, the critical question for the reviewing court is not "the moral culpability or willfulness of the prosecutor," but the resulting harm to the defendant. United States v. Agurs, 427 U.S. 97, 110 (1976). "[T]he suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87 (1963) (emphasis added). If the suppression or destruction of evidence results in constitutional error, "it is because of the character of the evidence, not the character of the prosecutor." United States v. Agurs, supra, 427 U.S. at 110. In this case, the Florida Supreme Court focused impermissibly on the character of the prosecutor, wholly

ignoring the character of the evidence.

After concluding that the government's conduct, though unfortunate, was excusable,[9] the Florida Court in effect declared that a new trial would have been required had there been any governmental bad faith: "We wish to emphasize, however, that if even the slightest hint of prosecutorial misconduct was present in the case the result might well be different." (A-6) Although the Court evidently found the case to be a close one, its findings of governmental good faith tipped the balance against reversal. The Florida Court's standard thus directly conflicts with this Court's clear holdings that the propriety of the government's behavior is irrelevant to the

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[9]Petitioner vigorously disputes the Court's finding that the government's behavior was "excusable". The Court relied on its finding that Petitioner's eventual prosecution was "unforeseeable" when the evidence was destroyed in 1976. In fact, the evidence against Kelley was both known and available as a matter of law. See infra at 37 at n.18.

reviewing court's "overriding concern with the justice of the finding of guilt." United States v. Agurs, supra, 427 U.S. at 112.

In determining that no reversible error occurred here, the Florida Supreme Court explicitly employed "an analysis balancing any negligent or culpable conduct of the prosecutor with any prejudice to the defendant from the destruction of evidence." (A-5) This variable analysis test operates like a seesaw: as the level of the government's bad faith goes up, the level of prejudice the defendant must show goes down. More important as the level of bad faith goes down, the defendant must make a greater showing of prejudice to obtain reversal.[10] Under this standard, once

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[10]The Florida Court explicitly relied on Salvatore v. State, 366 So.2d 745,751 (Fla. 1978), cert. denied, 444 U.S. 885 (1979), which states that "more excusable conduct of the prosecutor -- such as mere negligence -- calls for a showing of greater prejudice to the defendant before relief will be granted."

a determination of good faith is made, the reviewing court is free to examine an appellant's claim of prejudice quite peremptorily, for unless an extraordinary showing is made, no reversal will be required.[11]

In this case, the Florida Supreme Court applied its unconstitutional "sliding scale" to Petitioner's direct detriment. Once having found good faith, the court summarily dismissed Petitioner's claim of prejudice without reaching or specifically determining whether the missing evidence was material.

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[11]Had the Florida Court's variable seesaw operated in one direction only, used solely to expand the protection given to defendants by lowering the prejudicial showing which must be made, there would be no constitutional infirmity. State courts are free to provide greater protection to defendants than that guaranteed by federal courts. See, e.g., Michigan v. Long, 463 U.S. 1032 (1983); Oregon v. Hass, 420 U.S. 714, 719 (1975). Here, however, the seesaw works both ways, operating in this case to raise Petitioner's burden impermissibly.

The court deferred without discussion to the trial court, which, it said, had "specifically found that the destruction of the particular evidence here in question did not prejudice appellant's case ..." In fact the record plainly shows that no such specific finding was ever made by the trial court, either before or after the trial.[12]

The Florida Court's holding and analysis are not saved by the fact that this case involves destruction rather than suppression of evidence, and thus arguably falls within the ambit of Trombetta, rather than Brady,

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[12]Indeed, in denying Petitioner's pre-trial motion to dismiss the indictment, the trial court explicitly left open the possibility that as the evidence was developed at trial, "there may well be a point in this trial when some of these items will become apparent that there is prejudice." (A-18) Although determinations of materiality are best made after trial, in light of all the evidence adduced at trial, United States v. Valenzuela-Bernal, 458 U.S. 858, 874 (1982), no specific post-trial findings on this issue were ever made.

Agurs, or Bagley. It may be argued that because the Trombetta opinion acknowledged state officials' apparent good faith, 104 S. Ct. at 2534, it established a separate standard for assessing destruction of evidence claims, one which considers both the prosecutor's good or bad faith and the materiality of the missing evidence, while the standard for suppression claims considers materiality alone.[13]

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[13]In Trombetta, this Court noted that, in destroying breath samples, state officials acted "in good faith and in accord with their normal practices," and were not involved in a "calculated effort to circumvent" Brady's disclosure requirements. 104 S.Ct. at 2534. Additionally, "the record contains no allegations of official animus toward respondents or of a conscious effort to suppress exculpatory evidence." Id. A close reading of the Trombetta opinion, however, indicates that when the Court moved on to the "more important" issue of whether the policy at issue was "without constitutional defect," the emphasis was wholly on materiality, that is, on the impact of the destruction at trial, and no further mention of good or bad faith was made. Id. Thus, any conflict between Trombetta and Agurs is more apparent than

(footnote continued)

In this case, had the government retained the real evidence relating to the murder, but failed to disclose it until after the trial, the obvious prejudice to Petitioner would surely entitle him to reversal. The fact that the evidence was destroyed rather than suppressed should not change the result by permitting the reviewing court to factor the government's "good faith" into its evaluation. The Florida court's "seesaw" standard, however, permits precisely this divergence of result, because it is premised on an improper willingness to raise or lower the showing of prejudice a defendant must make based on the prosecutor's good or bad faith. The Supreme Court of Florida's opinion in this case thus reflects a fundamental misunderstanding or misapplication of federal constitutional

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(footnote continued from previous page)
real; the bottom line of both decisions is the same focus on result.

principles.

Because there is a possible conflict between the good-faith language in Trombetta and this Court's result-oriented holdings in Brady, Agurs and Bagley, state and federal courts may be confused as to the standard to apply in assessing destruction of evidence cases and may apply an unconstitutionally stringent standard which focuses improperly on the government's good or bad faith. The Supreme Court of Florida has developed an improper standard, and, by applying it to Petitioner's claim, has deprived him of his constitutional rights. This case thus presents an excellent opportunity for this Court to resolve the apparent conflict and clarify the standard or standards to be applied in evaluating suppression and destruction of evidence claims.

3. The Government's Intentional Destruction of all of the Real Evidence Relating to the Murder Deprived Petitioner of Due Process and a Fair Trial.

The evidence destroyed before Petitioner's trial included all of the real evidence relating to the murder. In 1976, five years before Petitioner was indicted, the government requested and obtained court permission to destroy the evidence from Sweet's trial, attesting that "this cause has been disposed of" and asserting a shortage of storage space. The government then destroyed all of the physical items taken from the actual murder site, including a spent bullet, a bloody bedsheet, and a portion of the victim's shirt.[14] Clearly, by 1976, more than

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[14]The items destroyed were all of the government's exhibits from John Sweet's 1968 trial. In addition, the government's investigative files contained other real evidence relating to the crime, including the brake pedal of a car Petitioner allegedly drove from the murder scene, fingernail scrapings and hair samples and carpeting from (footnote continued)

nine years after the murder, and even more surely by 1981 when Petitioner was indicted, no amount of further investigation could produce new physical evidence about the murder scene itself; whatever once existed was either in the government's possession or had disappeared years earlier. By destroying the evidence it possessed, therefore, the government effectively eliminated every shred of physical evidence Petitioner might have used to prove that he was not at the murder scene. The missing evidence would have been central to Petitioner's defense. At trial, Petitioner stressed the obvious conflict between the blood-splattered murder scene and "Bill Kelley's" appearance, with no bloodstains of any kind, shortly after the

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(footnote continued from previous page) the victim's home. The government made no effort to preserve these items, and by the time of Petitioner's trial in 1984, the government was unable to produce them; they too had been lost or destroyed.

alleged time of the murder. Whoever stabbed Maxcy must have been covered with blood; Von Etter's companion was not, therefore even if that companion were Petitioner, he could not have been the killer. One obviously exculpatory item was the blood-stained bedsheet, slit or cut in numerous places, found at the murder scene. The government contended that the sheet had been wrapped around Maxcy to subdue him, and that he was stabbed through it. Had the sheet been available, Petitioner could have had it examined by experts, who could have testified that whoever stabbed Maxcy through the sheet would have been stained with blood.[15] Without

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[15]Indeed, when Petitioner tried to elicit testimony from a police witness that the blood must have gone through the sheet onto the attacker, the court sustained an objection on the ground that that such a question called for a conclusion. Transcript on Appeal, Vol. 3, 504. Had the sheet been available for expert analysis, Petitioner might well have been able to introduce an expert conclusion on

(footnote continued)

the sheet itself, or expert analyses of it to support his claim, Petitioner could not demonstrate convincingly that Maxcy's murderer must have emerged from the scene literally drenched in blood.[16]

While Petitioner was thus prevented from using the sheet to demonstrate his innocence, the prosecutor refused to be similarly restricted; he attempted to use the absent sheet to demonstrate Petitioner's guilt. In

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(footnote continued from previous page) exactly this issue. Without it, of course, any characterization of the sheet to the jury by witness or prosecutor, was based on speculation.

[16]Petitioner could also have had the destroyed evidence tested for fingerprints and blood types; he could have had an expert examine the size and direction of the slits. The absence of Petitioner's fingerprints or blood from the scene, or the presence of someone else's, would have provided convincing evidence that Petitioner did not stab Maxcy, and might have provided evidence of who the murderer actually was. Moreover, an expert analysis of the sheet could have demonstrated that the murder was committed by someone smaller or weaker than Petitioner or left handed.

his closing, the prosecutor exploited the government's destruction of precisely the same sheet by insinuating to the jury that it was the sheet itself that prevented Petitioner from becoming bloodstained, because the sheet would have absorbed the victim's blood. Without the sheet, Petitioner had no affirmative evidence to rebut the prosecutor's improper insinuations. Thus, the government first destroyed the evidence and then drew adverse inferences about it to the jury.[17] A more prejudicial situation would be difficult to imagine.

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[17]The result here is thus exactly the opposite of the general rule that one party's failure to produce a favorable witness or evidence, where it is peculiarly within that party's power to do so, creates an inference that the evidence or testimony would have been unfavorable to the party who failed to produce it. Graves v. United States, 150 U.S. 118, 121 (1893); United States v. Charles, 738 F.2d 686 (5th Cir. 1984); McCormick on Evidence §272 at 804-06 (3d ed. 1984). Here the government both created the unavailability and profited from it.

4. The Extraordinary Length of Time before Indictment and the Weakness of the Government's Case Against Petitioner Exacerbated the Prejudice to him from the Government's Destruction of Critical Exculpatory Evidence.

The prejudicial impact to Petitioner of the government's destruction of the real evidence in this case was exacerbated by the enormous amount of time -- 18 years -- between the crime and Petitioner's trial. With the passage of each year, Petitioner's ability to mount an effective defense necessarily weakened. Witnesses' memories faded. Potential witnesses died or could no longer be located. Any possibility of discovering new evidence disappeared.

Ordinarily, an appropriate statute of limitations helps prevent a miscarriage of justice from occurring where an innocent defendant is brought to trial long after the evidence and testimony necessary to prove his innocence have disappeared. United States v.

Marion, 404 U.S. 307, 322 (1971); Toussie v. United States, 397 U.S. 112, 114-15 (1970). Because there is no statute of limitations for murder in Florida, there is no statutory bar to bringing a suspect to trial at any time. The government's entitlement to try a murder case many years after the crime is not unlimited, however; the defendant retains forever his constitutional right to due process and a fair trial, and the legitimacy of any long-delayed murder prosecution must be measured against that due process standard. When the evidence relating to the murder becomes so stale that a fair trial is no longer possible, the government can, indeed must, decide to close the case, and with it the possibility of further prosecution.

Here, the government made exactly this determination in 1976, nine years after the murder, when it attested to the court that

"this cause has been disposed of" and destroyed its files of real evidence. When that determination was made, the case against Petitioner was fully known, and all of the evidence later introduced against him was available, as a matter of law.[18] By closing the "cause" and destroying the evidence, the government graphically declared that, in its

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[18]Petitioner had been a prime suspect in this case since the original investigation in 1966. He was not tried then because, as the government admitted, its case against him was completely insufficient. By 1976, all charges against Sweet, the government's star witness against Petitioner, had been dropped. Sweet's alleged connection with Petitioner was fully known, as was the substance of any testimony Sweet might provide. Had the government wished to proceed against Petitioner, it could have subpcenaed Sweet, and, through negotiation or grant of immunity, obtained his testimony. As courts have repeatedly held, the testimony of a witness who suddenly volunteers to testify after having refused to do so at trial is not "newly discovered evidence" entitling a defendant to a new trial. See, e.g., United States v. Diggs, 649 F.2d 731, 740 (9th Cir. 1981); United States v. Jacobs, 475 F.2d 270, 286 (2d Cir.), cert. denied, 414 U.S. 821 (1973). As a matter of law, such testimony was therefore always available to the prosecution.

judgment, there could be no further prosecutions for the Maxcy murder. This decision was clearly legitimate; had the government abided by it, no due process violation would have occurred. Instead, however, the government tried to have it both ways, asserting that because the case was closed, all the relevant real evidence might be destroyed, and then counter-asserting nine years later that the case was not totally closed after all, even though, by then, because of space shortages, it had destroyed the only kind of evidence which might have been useful after all these years. Indeed, this case raises the terrifying possibility that an innocent man may have been convicted -- and may be executed -- because the court clerk ran out of storage space.

Moreover, the governmental decision to destroy the evidence in this case appears to

have been essentially clerical, made for convenience only. There is no indication that any responsible official ever paused to consider the impact such an action might have on any prosecution of Petitioner, who was admittedly still an "active suspect." Because the destruction occurred five years before Petitioner's indictment, he was of course unable to object or to request that the evidence be retained. In such a situation, the government's obligation must transcend the merely adversarial; it must ensure that a miscarriage of justice does not occur. See, e.g., United States v. Bagley, 105 S.Ct. 3375, 3380 (1985); Berger v. United States, 295 U.S. 78, 88 (1935). Here, a miscarriage of justice did occur when the government sought and obtained Petitioner's conviction years after destroying critical exculpatory evidence to suit its own administrative convenience.

Because the government's case against Petitioner was extremely weak, there is a particularly strong likelihood that the jury would have reached a different result had the missing evidence been presented. A first trial ended in a mistrial when the jurors, despite extended deliberations and judicial urgings, were unable to reach a consensus on Petitioner's guilt. At the second trial, the jury announced that it too was deadlocked.

Had the inculpatory evidence in this case been overwhelming, the destruction of certain exculpatory items might be said to have had only a slight impact on the verdict. "On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." United States v. Agurs, supra, 427 U.S. at 113 (1976). Here, the case against Petitioner was

unquestionably close. Moreover, the missing evidence was not a single item, or one of "minor importance", as in many suppression or destruction of evidence cases;[19] instead it included all of the real evidence relating to the murder scene. If even one item had proven to be significantly exculpatory, it is highly probable that a guilty verdict would not have been returned.

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[19]See, e.g., California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528 (1984) (breath sample); Killian v. United States, 368 U.S. 231 (1961) (notes covering one witness's oral reports regarding expenses).

POINT II

THE ADMISSION OF THIRD PARTY TESTIMONY PURPORTEDLY AS A PRIOR CONSISTENT STATEMENT WHERE THE DECLARANT DENIED MAKING THE STATEMENT VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND CONFRONTATION

Abe Namia, a private investigator hired by John Sweet's attorney after Sweet was charged with the murder of Charles Von Maxcy, gave extremely damaging but extraordinarily questionable testimony. Despite Sweet's vigorous denial that he ever told Namia the details of the murder and of Petitioner's alleged involvement, Namia was allowed over objection to describe alleged conversations with Sweet in which Sweet had done just that.

Through Namia's testimony, Sweet's inculpatory claim was allegedly confirmed. In addition, through Namia's hearsay testimony, facts which Sweet either denied or had no recollection of were presented to the jury.

Whatever justification might arguably exist for the admission into evidence of a witness' prior consistent statements, no recognized justification exists for admitting new evidentary facts through this device.

Despite the fact that Sweet denied ever engaging in conversations with Namia incriminating himself and Kelley, and that Namia's testimony included matters not testified to by Sweet at this trial, the Supreme Court of Florida ruled that Namia's testimony was properly admitted as a prior consistent statement under Section 90.801(2)(b) of the Florida Statutes.

Section 90.801(2)(b) is virtually identical to Fed. R. Evid. 801(d)(1)(B). A precondition to admissibility under 90.801(2)(b) of the Florida Statutes, as under Rule 801(d)(1) of the Federal Rules, is that the declarant testifies at the trial or

hearing and is subject to cross-examination concerning the statement. Both rules provide that prior consistent statements of a witness are not hearsay if offered to rebut a charge of recent fabrication. They require that the out-of-court statement by the declarant be "consistent with his testimony." Out-of-court statements reiterated during in-court testimony are regarded as adopted by the witness and are either excluded from the definition of hearsay or admissible as an exception to the hearsay rule because the declarant is subjected to the rigors of cross-examination. Thus, underlying the rule is the requirement that the declarant testify that he made a prior out-of-court statement and that what he said is consistent with his in-court testimony. As recently held by the

Seventh Circuit, after noting that many courts allow third party rehabilitation of an impeached declarant,

> These courts held that 801(d)(1)(B)'s third admissibility requirement was satisfied if the declarant had testified and been subject to cross-examination sometime during trial. Rule 801(d)(1)(B), however, requires not only that the declarant have been generally subject to cross-examination; he must also be subject to cross-examination concerning the out-of-court declaration. We hold that the district court erred in permitting Howard to testify concerning Vinson's out-of-court statement. If the Government wished to rebut defendant's charge of recent fabrication, the proper way to do so was to elicit Vinson's rehabilitating statement during redirect examination or to recall Vinson to testify during rebuttal.

United States v. West, 670 F.2d 675, 687 (7th Cir.), cert. denied, 457 U.S. 1124 (1982). See also United States v. Maultasch, 596 F.2d 19 (2d Cir. 1979).

Since a prior consistent statement rebuts the inference of recent fabrication and is considered relevant to the jury's determination whether to believe the in-court testimony of the declarant, prior to deciding whether a third party should be allowed to testify about a prior consistent statement, the logic of the rule requires that the declarant assert that he made the prior consistent statement. After all, the sole question is the credibility of the declarant and the credence to be given his in-court testimony.

Here, since Sweet denied making the statement, the purpose of the Confrontation Clause is defeated. Effective confrontation of Sweet was only possible if Sweet claimed he made the prior statement to Namia, thus adopting the statement as his. See Douglas v. Alabama, 380 U.S. 415 (1965). Although there

is not necessarily a congruence between the Confrontation Clause and the rules of hearsay, in this context the origins of both and the similarity of values protected demonstrate that Namia's testimony cannot be the basis for a criminal conviction.

As in the famous example involving Sir Walter Raleigh discussed by both the majority and Justice Harlan in California v. Green, 399 U.S. 149 (1970), when an accusation is reported during proceedings by a third party and the declarant retracts (as did Raleigh's accuser) or denies making the accusation (as here), the vice which gave impetus to the Confrontation Clause is presented. The accused has no way of challenging the accusation using cross-examination, the "greatest legal engine ever invented for the

discovery of truth." 5 Wigmore on Evidence §1367, quoted in California v. Green, supra, 399 U.S. at 158.

The harm is devastating if one assumes that Sweet in fact made the out-of-court statements about which Namia testified because those statements were not made in a context which gives any assurance of reliability. They were not made under oath or subject to cross-examination yet they were undoubtedly considered by the jury for the truth of the matters asserted. In a capital case, admission of such testimony is particularly prejudicial. There was no way for Petitioner to have tested the recollection and motives of his accuser Sweet, when Sweet denied making the statements to Namia. Cross-examination of Namia could not serve to challenge the accusation. As to facts presented by Namia which went beyond what Sweet testified to

himself at the trial, the evil is paticularly acute. A conviction based upon such testimony violates due process. See California v. Green, supra at n.15; Thompson v. City of Louisville, 362 U.S. 199 (1960).

Although the general rule is that prior statements have no probative value because "mere repetition does not supply veracity," 4 J. Weinstein & M. Berger, Weinstein's Evidence, §801(d)(1)(B)(01), quoting United States v. McPartlin, 595 F.2d 1321, 1351 (7th Cir.), cert. denied, 444 U.S. 833 (1979); United States v. Harris, 761 F.2d 394, 399 (7th Cir. 1985), here the repetition was demonstrably harmful.

POINT III

IN THIS CASE THE DEATH PENALTY CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT FORBIDDEN BY THE EIGHTH AND FOURTEENTH AMENDMENTS

Whether or not the death penalty is ever permissible,[20] in this case it is a cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments.

In the extremely abbreviated sentencing phase of this case, the jury recommended by a divided vote, and the trial judge imposed, the death penalty. The judge's decision was based on a finding of three statutory aggravating circumstances: the crime was committed for pecuniary gain; it was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification; and

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[20]Petitioner contends that it is not. See Furman v. Georgia, 408 U.S. 238, 257 (1974) (Brennan, J., concurring); id. at 314 (Marshall, J., concurring).

the Petitioner had previously been convicted of a felony involving the use or threat of violence.

Before the sentencing judge and the State's highest court, Petitioner raised numerous challenges to the Florida death penalty statute and the imposition of the death sentence in his case. Inter alia, he urged that the trial judge had impermissibly multiplied aggravating factors by finding two separate aggravating circumstances based on the single fact that the crime was alleged to be murder for hire; that the prosecution had improperly argued to the advisory jury that it could find aggravating circumstances because the crime was especially heinous, atrocious or cruel and because it was committed in the course of a burglary; that the trial judge violated Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982),

by refusing to consider, as mitigating factors, the length of time since the crime, the impact that had on Petitioner's ability to defend himself, and the possibility that he was not the actual killer. He urged in addition that Florida's death penalty statute is unconstitutional because it is applied arbitrarily and discriminatorily. Petitioner also asserted that the State's death penalty was unconstitutional because it is imposed unevenly on the basis of the race of the victim, an issue presently before this Court. See McClesky v. Kemp, No. 84-6811, cert. granted, July 7, 1986; Hitchcock v. Wainwright, No. 85-6756, cert. granted, 54 U.S.L.W. 3809 (S.Ct. June 9, 1986).[21]

[21]He also urged that the application of this death penalty statute, not in existence at the time of the crime, violated the Constitutional ban on ex post facto laws.

The Supreme Court of Florida summarily rejected all of Petitioner's challenges, stating:

> Finally, appellant raises a number of arguments attacking the application of the death penalty statute to his case and the statute's constitutionality. Having carefully reviewed each of these contentions, they are found to be without merit.

Petitioner's claims merit review by this Court, particularly in light of the Florida Court's unexplained and summary rejection of them. One of his claims -- that the death penalty is imposed discriminatorily on the basis of the victim's race -- is presently before this Court. Furthermore, there is no principled way to distinguish the case, in which the death penalty was imposed, from the many cases in which it was not, and, thus, the sentence cannot stand.

In Godfrey v. Georgia, 446 U.S. 420 (1980), this Court considered whether, in affirming the sentence of death in that case, the Georgia Supreme Court adopted such a broad and vague construction of the relevant aggravating circumstances so as to violate the Eighth and Fourteenth Amendments to the United States Constitution. Id. at 423. In a 6 to 3 decision, this Court reversed the death penalty in that case. The plurality decision -- written by Justice Stewart and joined by Justices Blackmum, Powell and Stevens -- concluded that Godfrey's "crimes cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder." Id. at 433. There was thus "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Id. Since a capital sentencing scheme

must provide a "meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many in which it is not," the Georgia Court's decision to uphold the imposition of the death penalty for Godfrey's crimes was unconstitutional. Id. at 427, quoting Gregg v. Georgia, 428 U.S. 153 (1976), and Furman v. Georgia, 408 U.S. 238, reh. denied, 409 U.S. 902 (1972)). This Court thus answered "no" to the question posed for decision: "Whether, in light of the facts and circumstances of the murders [Godfrey] was convicted of committing, the Georgia Supreme Court can be said to have applied a constitutional construction" to its death penalty statute.

This case demonstrates that Florida's statutory scheme is similarly infirm. It is incapable of avoiding arbitrary and capricious infliction of the death penalty. Petitioner's

death penalty was ostensibly imposed based on three aggravating circumstances but two of them were essentially the same and the remaining one is not an appropriate basis for imposition of the death penalty.

In this particular case, because the crime was an alleged "murder for hire," the statute permitted and the court below found two aggravating circumstances (crime for pecuniary gain, crime committed in a cold, calculated and premeditated manner) on the basis of essentially the same facts. The statutory scheme thus impermissibly pyramids aggravating circumstances and improperly enhances the chance that aggravating circumstances will be found to outweigh mitigating ones.

Finally, the death sentence was imposed here, at least in part, on the basis of Petitioner's previous conviction of a felony

involving the use or threat of violence to the person. All that is known of that prior conviction is that it occurred 25 years earlier, when Petitioner was a 16 year old juvenile, and that it somehow involved 114 dollars and a six-pack of beer. There is no indication that a weapon was used to commit the crime or that the victim was harmed.

In Godfrey v. Georgia, 446 U.S. 421 (1980), the plurality determined that the Georgia death penalty law, under which it was an aggravating circumstance that the crime was outrageously or wantonly vile, horrible or inhuman, was not tailored to avoid arbitrary and capricious infliction of the death penalty and to obviate standardless sentencing discretion.

Florida's statutory scheme is similarly arbitrary in permitting a previous conviction for a crime involving the use or threat of

violence to be a basis for the imposition of the death penalty. Its extremely capricious operation is evident in that, in this case, it permits a single 25 year old conviction for a single robbery the details of which are entirely unknown to serve as the basis for a sentence of death.

Petitioner was convicted based on the inherently suspect uncorroborated testimony of an accomplice given 18 years after the events, and long after the State's destruction of the physical evidence of the crime, evidence which could have exculpated the defendant. Under these circumstances, faith in the validity of the verdict can be shaky at best.

Nevertheless, the Petitioner has been sentenced to die, because the crime was murder for hire and the Petitioner -- 25 years

earlier -- was convicted of a robbery. In the totality of these circumstances, the death penalty is unconstitutional.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the petition for a writ of certiorari.

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Dated: July 9, 1986

APPENDIX

EDITOR'S NOTE

PAGES A-1 thru A-15 WERE POOR HARD COPY AT THE TIME OF FILMLNG. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court of Florida

No. 65,134

WILLIAM HAROLD KELLEY, Appellant,

vs.

STATE OF FLORIDA, Appellee.

[April 10, 1986]

ADKINS, J.

William Kelley appeals his conviction for the first-degree murder of Charles V. Maxcy and the death sentence imposed. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

Appellant's conviction represented the resolution of a highly unusual case, raising some unusual issues. Appellant was indicted in December of 1981 for the Maxcy murder, committed in October of 1966. An explanation of this delay in prosecution requires an examination of the figures involved and the evidence adduced at appellant's trial.

John Sweet, involved in an illicit love affair with Irene, the victim's wife, planned the murder so that he and she could live together on Maxcy's inheritance. Towards this end, Sweet contacted a Walter Bennett in Massachusetts and made the necessary arrangements. A price was set, and in early October of 1966 appellant Kelley and one Von Etter carried out the sinister task.

Because prosecutors found the evidence insufficient to proceed against appellant and Von Etter, and because Irene Maxcy

received immunity in return for her testimony in the case, only Sweet was originally tried. His first trial resulted in a mistrial, and the conviction resulting from his second trial was reversed on appeal. Sweet v. State, 235 So.2d 40 (Fla. 2d DCA), cert. denied, 239 So.2d 267 (Fla. 1970).

At that point, the state felt unable to proceed against Sweet due to the lapse of time and the loss of certain witnesses' testimony. Thus, the case lay dormant for over ten years. This standstill was broken only after Sweet, in 1981, became involved in a criminal situation he found threatening and approached law enforcement authorities in order to seek some protection by receiving immunity in return for his testimony as to a wide variety of crimes.

It was this testimony upon which appellant's indictment and prosecution in this case were centrally based. Sweet testified as to the details of the planning and execution of the murder, as well as to a purported conversation with appellant several years after the murder in which appellant allegedly said "Boy, [Maxcy] was a powerful guy. I stabbed him three or four times and he kept coming after us, so I had to shoot him in the head." The other central testimonial evidence presented in appellant's trial below was that of one Abe Namia, a private detective originally hired after the murder by Sweet's defense counsel. Namia testified as to some purported statements of Sweet's made in 1967 incriminating appellant. The statements were admitted to rebut an inference of recent fabrication established by the rigorous cross-examination of Sweet as to his extensive immunity and possible motives to fabricate.

Appellant's first trial ended in a mistrial, the jury unable to agree on a verdict. His second trial began in March of 1984. In the verdict presently appealed, the jury found Kelley guilty of first-degree murder and recommended the death penalty. In April 1984, the trial judge filed his written findings of fact in support of the death penalty. He found three statutory aggravating circumstances: prior conviction of a violent felony, section 921.141(5)(b), Florida Statutes (1983); homicide commited

for pecuniary gain, section 921.141(5)(f); and homicide committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, section 921.141(5)(i). As a nonstatutory mitigating circumstance he found that appellant was the only participant in the murder to receive punishment.

Appellant raises a number of attacks on the trial of his case and the sentence imposed, alleging a number of prejudicial errors spanning from the time period well before his indictment to the case's conclusion. These contentions will be explored in the order presented.

Appellant first argues that the state's destruction of the real evidence in the case over five years before his indictment deprived him of due process of law and frustrated the preparation of his defense. In addressing this contention, the unusual procedural history resulting in this problem must be considered.

After the reversal of Sweet's second conviction on appeal, he successfully moved for the dismissal of his indictment. At that point, with no active suspects capable of prosecution, the case file, including the evidence involved, was transmitted to the clerk of the court for maintenance. The evidence there remained until April of 1976, nine and a half years after the murder. At that point the state, at the clerk's request, moved for an order requesting the court's permission to dispose of the evidence. The state's motion, indicating that "this cause has been disposed of," was granted and the evidence destroyed. The case subsequently lay dormant until Sweet's testimony against appellant Kelley revitalized the prosecution in 1981.

The destroyed evidence which appellant claims may have had particular exculpatory value was real evidence, principally taken from the scene of the crime -- a bullet, a bloody bedsheet purportedly used to subdue the victim during repeated stabbings, and a shred of the victim's shirt. Also destroyed were two handwritten statements by Sweet, which appellant urges would have been useful in impeachment. Copies of the documentary evidence in the case, by far the bulk of the evidence presented at the

earlier Sweet trials, were preserved and used against appellant in the trial below.

Appellant argues that the state's intentional destruction of the evidence of Maxcy's killing over five years before his indictment for a murder committed in 1966 so violated his due process rights that his indictment should have been dismissed. While recognizing that serious constitutional rights are involved in this question, and that the trial of a capital case in the absence of physical evidence raises grave concerns as to fairness, we cannot agree that in this case appellant's due process rights have been violated.

In resolving the serious problems involved when evidence once in the possession of the state is either lost or suppressed, Florida's courts have built their analyses upon the United States Supreme Court's decisions of Brady v. Maryland, 373 U.S. 83 (1963), and United States v. Agurs, 427 U.S. 97 (1976). Brady laid down the proposition that "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87.

The Agurs Court refined the Brady holding by exploring the concept of constitutional "materiality." The bottom line concern in a suppressed evidence case, the Court made clear, is the justice of the finding of guilt. If, upon consideration of the record as a whole, the omitted evidence creates a reasonable doubt not otherwise existing, the evidence is material and constitutional error has been committed. Due process rights are not violated in every case involving the suppression of evidence. "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." 427 U.S. at 109-10.

In State v. Sobel, 363 So.2d 324 (Fla. 1978), this Court utilized that language from Agurs in formulating an analysis applicable to the issue of appropriate sanctions when the state

has destroyed evidence. Recognizing that "dismissal of charges against a defendant. . .was an extreme sanction to be utilized with the greatest caution and deliberation," Sobel, 363 So.2d at 327, this Court approved an analysis balancing any negligent or culpable conduct of the prosecutor with any prejudice resulting to the defendant from the destruction of the evidence. Fairness dictated that the burden be placed on the state to prove lack of prejudice to the defendant, if it so contended.

In Salvatore v. State, 366 So.2d 745 (Fla. 1978), cert. denied, 444 U.S. 885 (1979), we reiterated this balancing standard, implicitly recognizing that each of the factors considered reflected different aspects of the same fundamental concern -- that the defendant received a fair trial. The standard of prejudice which must be met by the defendant, we held, varies inversely with the degree to which the conduct of the trial below has violated fundamental notions of fairness. In Salvatore, finding no negligence on the part of the prosecution, we noted that "[i]t should not be presumed that error injuriously affects the substantial rights of the defendant," 366 So.2d at 751, and found that Salvatore's rights had not been violated by the loss of evidence in the case.

Appellant argues that application of the variable standard analysis established in Sobel and Salvatore to the facts of this case mandates a different result. Because the state-ordered destruction of the evidence was at best inexcusable negligence, it is argued, the conduct of the state weighs heavily towards reversal of the decision below. Citing the lack of a statute of limitations for first-degree murder, and appellant's status as a suspect since the commission of the murder in 1966, appellant urges that the state's destruction of the evidence constituted a breach of its extraordinary duty under these facts.

While we find the destruction of the evidence in this case unfortunate, we cannot read the facts as even hinting at intentional behavior by the state affecting appellant's substantial rights. While extremely hesitant to condone the state's behavior here, we find no negligence in its actions.

Obviously, the state had insufficient evidence to proceed against appellant until Sweet offered his testimony in 1981. The destruction of the evidence took place nearly nine and a half years after the state's fruitless efforts to convict Sweet, and five years before appellant's indictment.

In a sense, this is a case of first impression, in which the principles set forth in Brady, Agurs, Sobel and Salvatore are applicable only by analogy. In none of those cases was the lost or destroyed evidence completely unlinked to any active, or even foreseeable, prosecution. On the unusual facts of this case, therefore, the state's behavior may be excused. We wish to emphasize, however, that if even the slightest hint of prosecutorial misconduct was present in the case the result might well be different.

In applying the second prong of the analysis, we find that the state has met its burden of establishing lack of prejudice to the appellant's case. Phrased alternatively, we find that appellant has failed to establish a sufficient degree of prejudice to justify a reversal of his conviction. Dupe v. State, 395 So.2d 501, 504 (Fla.), cert. denied, 454 U.S. 933 (1981).

In resolution of this necessarily speculative analysis, appellate courts have tended to defer to the findings of the trial court on the matter. Sobel, 363 So.2d at 328; Smith v. State, 400 So.2d 956 (Fla. 1981); Krantz v. State, 405 So.2d 211, 212 (Fla. 3d DCA 1981); Budman v. State, 362 So.2d 1022 (Fla. 3d DCA 1978). The trial court below specifically found that the destruction of the particular evidence here in question did not prejudice appellant's case, or create an otherwise non-existent reasonable doubt. In light of the centrality of testimony rather than real evidence in the case, we cannot disagree. We therefore find the denial of appellant's motion to dismiss the indictment proper.

In his second point on appeal, appellant argues that the trial court erred in permitting a witness to testify as to an alleged conversation he had with John Sweet in 1967. The

witness, Abe Mamia, was a private investigator hired by Sweet's trial counsel after the murder in 1966. During the conversation, Sweet allegedly made some statements which now incriminate appellant. Mamia's testimony was admitted below as testimony of prior consistent statements by Sweet, rebutting an inference of recent fabrication or improper motive established in Sweet's cross-examination.

We reject appellant's contention that Mamia's testimony was hearsay and improperly admitted. Defense counsel clearly established an inference of improper motive to fabricate through its extensive cross-examination of Sweet concerning the laundry list of crimes for which he had been given immunity in return for his testimony against Kelley. Appellant does not deny that the jury was left with an impression of Sweet's improper motive to fabricate, Van Gallon v. State, 50 So.2d 882 (Fla. 1951), but argues that Sweet's statements as reported by Mamia were not sufficiently consistent with Sweet's testimony at trial to be properly admissible under section 90.801(2)(b), Florida Statutes (1983).

While keeping in mind that "a failure to properly adhere to the requirement of consistency tends to border on a disregard of the dangers sought to be restrained by the hearsay rule," Sosa v. State, 215 So.2d 736 (Fla. 1968), we find that the two statements concerning the murder varied in only legally insignificant aspects. More troublesome than these minor inconsistencies was the fact that Mamia's recollection of Sweet's prior testimony contained certain facts beyond those in Sweet's testimony in chief, which Mamia's testimony was admitted to corroborate.

Sweet, according to Mamia, had informed Mamia that prior to the murder certain unidentified assassins had twice travelled to Florida to kill Maxcy. Although Sweet's testimony in chief did not refer to these shadowy figures, we find that no reversible error was committed in that the additional facts involved were neither highly incriminating nor critical to the

establishment of an ultimate fact in dispute. Sosa, 215 So.2d at 745.

In short, appellant was not prejudiced by the admission of the testimony. We have before held, too, that questions concerning the admissibility of extrajudicial statements for the purpose of rehabilitating witnesses impeached by the inference of a recent motive to fabricate are largely addressed to the sound discretion of the trial court, and are not to be reversed in the absence of a prejudicial abuse of discretion. Sosa, 215 So.2d at 744. See also United States v. DeVore, 423 F.2d 1069, 1073 (4th Cir. 1970), cert. denied, 402 U.S. 950 (1971). We find no such abuse of discretion below, and so reject appellant's argument.

Next, appellant argues that the trial court erred in failing to answer a question addressed to it by the jury during its deliberations. After several hours of deliberation, the jury announced that it had reached an impasse. Upon receiving an Allen charge, Allen v. United States, 164 U.S. 492 (1896), the jury resumed its deliberations. The interaction in question occurred when the jury subsequently inquired of the court whether "John J. Sweet received immunity in Florida for first degree murder and perjury before he gave information on the Maxcy trial, and if he had anything to gain by his testimony."

The trial court, while aware that Sweet's testimony on cross-examination established the existence of such immunity, declined to explicitly answer the jury's question concerning the crucial issue since formulating an answer would have required him to both interpret Sweet's testimony and make a judgment as to his motivation.

Rather, the trial court offered to the jury to have Sweet's testimony read back in portions designated by the jury. We can see no abuse of discretion in such action. The court's insistence upon the jury's rather than its own choice of the passages to be re-read was proper, in light of the latter's legitimate hesitation to comment upon the evidence. The jury question here involved matters of fact, and this Court has held

that a trial judge need answer only questions of law raised by jurors. State v. Ratliff, 329 So.2d 285 (Fla. 1976).

In rejecting appellant's contention that the court below acted improperly in this respect, we finally note that Florida law has given the trial court a wide latitude in deciding whether or not to have testimony re-read to jurors upon request. Fla. R. Cr. P. 3.410; DeCastro v. State, 360 So.2d 474 (Fla. 3d DCA 1978), cert. denied, 368 So.2d 1365 (Fla. 1979); Simmons v. State, 334 So.2d 265 (Fla. 3d DCA 1976).

In his fourth point on appeal, appellant contends that the trial court erred in allowing the jurors to take notes during the trial and failing to adequately instruct the jury as to the proper role of note-taking. Whether or not a jury is to be allowed to take notes and use them in the deliberation process is a question within the sound discretion of the trial court. United States v. Rhodes, 631 F.2d 43 (5th Cir. 1980); United States v. Riebold, 557 F.2d 697 (10th Cir.), cert. denied, 434 U.S. 860 (1977).

The jurors were informed by the court that note-taking was optional, and instructed that a juror's note-taking in no way gave him or her authority over the others on the panel. We reject appellant's assertion that the jury was inadequately instructed, noting that no additional or different instructions on the matter were proposed by the defense below.

Next, appellant argues that the trial court erred in admitting certain of his post-arrest statements to FBI agents obtained in violation of his Miranda rights. Miranda v. Arizona, 384 U.S. 436 (1966). Appellant, allegedly in a slightly inebriated condition, was given and examined a Miranda warning form for 15-20 seconds before he returned it, saying "I know my rights." Later in the book-in procedure, appellant learned that he was wanted in Highlands County, Florida, for murder. After an agent commented to appellant "I'm certainly sure that Highlands County is going to place a detainer on you once they know you have been arrested in Florida," appellant made some statements about Maxcy's murder.

We need not reach in this case the validity of the Miranda warnings as given, and the possible effect of appellant's intoxication, in light of our finding that the agent's statement was not an interrogation within Miranda's purview. The statement, in other words, was not a deliberate attempt to elicit an incriminating response, as prohibited by Rhode Island v. Innis, 446 U.S. 291 (1980). The incriminating statements here in question were therefore volunteered, and neither the letter nor spirit of Miranda has been violated. The statements were therefore properly admitted into evidence.

Appellant next mounts an attack on certain instructions given to the jury in an effort to break a deadlock after it had deliberated for several hours and announced that it had reached an impasse. The judge gave Florida Standard Jury Instruction 3.06, the authorized jury deadlock instruction, and then proceeded to add some comments of his own. These comments, appellant argues, impermissibly misled and so coerced the jury into returning a verdict that appellant was deprived of his right to a fair trial.

As we have before recognized, the standard jury instructions should be utilized whenever appropriate, State v. Bryan, 290 So.2d 482 (Fla. 1974); Rigot v. Bucci, 245 So.2d 51 (Fla. 1971), for a trial judge walks a fine line indeed upon deciding to depart. Instructions given to a jury at the extremely sensitive point it has reached a deadlock must be carefully scrutinized, Kozakoff v. State, 323 So.2d 28 (Fla. 4th DCA 1975), cert. denied, 336 So.2d 1184 (Fla. 1976), and the risk is too great that an imprudent instruction may lay to waste the conscientious conduct of an otherwise entirely fair trial.

While the standard instructions are therefore to be preferred, the trial court's failure to give them does not determine the issue. A court's straying from the standard instructions, we have held, does not require automatic reversal. State v. Bryan, 290 So.2d 482 (Fla. 1974). The analysis is not so simple. We must here join the courts which have scrutinized extemporaneous deadlock instructions with an eye towards ensuring

that no false duty to decide was suggested, Nelson v. State, 438 So.2d 1060 (Fla. 4th DCA 1983); Lincoln v. State, 364 So.2d 117 (Fla. 1st DCA 1978), that the verdict returned was not coerced, Jenkins v. United States, 380 U.S. 445 (1965), and that the instructions were "balanced," encouraging neither acquittal nor conviction. State v. Bryan, 290 So.2d 482 (Fla. 1974); Gardner v. State, 405 So.2d 470 (Fla. 3d DCA 1981).

At this point it may be helpful to consider the actual instructions which appellant here attacks:

> I would ask that you give it your full consideration. It is an important case.
>
> If you fail to reach a verdict, there is no reason to believe the case can be tried again any better or more exhaustively than it has been.
>
> There is no reason to believe there is any more evidence or clearer evidence could be produced on either side. And there is no reason to believe the case could be submitted to twelve more intelligent and impartial people than you are.
>
> In the future a jury would be selected in the same manner that you were.
>
> Therefore, I would ask that you retire at this time and consider whether you wish to consider the matter further.
>
> It has taken us a week to get this far, and I would ask that you retire and consider the case further.

Appellant contends that these instructions so strayed from permissible bounds that the jury was coerced into returning its verdict of guilt, and that the verdict must therefore fall. While reluctant to engage in the speculative analysis of the effect these instructions may have had on the uncertain jury deciding appellant's guilt, we must, and find that caselaw and logic support the appealed conviction.

A fine line must be drawn in such an analysis, but we find that substantially similar instructions have been upheld, United States v. Dixon, 593 F.2d 626 (5th Cir.), cert. denied, 444 U.S. 861 (1979), and that instructions found prejudicial differ in some crucial respects from the instruction given below. Appellant contends, for example, that the result in Nelson v. State, 438 So.2d 1060 (Fla. 4th DCA 1983), should obtain in the

instant case. For purposes of comparison, it will be useful to examine the instructions given in that case:

> I don't think that anybody here would be served by you all not arriving at a verdict. It would be wasting your time for whatever period of time which I guess is . . . seven days now. Nobody can repeat this testimony and exhibits placed before you. If you all cannot arrive at a verdict, then something is wrong. . . . You just don't understand what happens if we had to retry this case. It is not just reproducing the witnesses . . . but it is going through this whole reppertoire [sic] again for you or for someone else when it is really not necessary. You have heard all the law. That is all the evidence there is. That is it as far as what was presented here before you.
>
> We look to you for the resolution of this case. It's that pure and simple. . . .
>
> I can't see that it would be impossible when we have just such a fine jury here.

438 So.2d at 1061.

The Fourth District found these instructions coercive in effect. A close examination of the instructions makes clear the prejudicial components which rendered the statement as a whole sufficiently coercive to justify the reversal of a first-degree murder conviction.

First, the instructions subverted the proper role of a jury in a capital trial by implying a false duty to reach a verdict in the case. Lincoln v. State, 364 So.2d 117 (Fla. 1st DCA 1978). Second, the jury was left with the impression that failure to return a verdict would constitute waste, and would put the court to a great deal of trouble upon retrial. United States v. Betancourt, 427 F.2d 851 (5th Cir. 1970).

Because the instructions in Nelson "made it appear that unless a verdict was reached . . . the court's confidence in the jury's common sense would somehow have been betrayed," 438 So.2d at 1063, the Fourth District found the risk unacceptably high that even a single juror may have been influenced to abandon his conscientious belief as to the correctness of his position.

The instructions given in the instant case presented no similar threat to the integrity of the jury system. Rather than demanding a verdict, the judge below demonstrated an attitude represented by his statement, "I would ask that you retire at

this time and consider whether you wish to consider the matter further." We also note that the jury continued to deliberate for a considerable period of time after receiving the instruction, returning to ask the court for an unrelated instruction. In sum, while disapproving of such departure from Florida's Standard Jury Instructions, we can find no prejudice resulting from the instructions as given.

In his seventh point on appeal, appellant argues that he was denied his sixth amendment right to the effective assistance of counsel. Generally, such claims are not reviewable on direct appeal but are more properly raised in a motion for post-conviction relief. Perri v. State, 441 So.2d 606 (Fla. 1983); State v. Barber, 301 So.2d 7 (Fla. 1974). Unlike those claims raised under the banner of ineffective assistance which we determined should have been raised on direct appeal in Adams v. State, 456 So.2d 888 (Fla. 1984), the claims here raised by appellant cannot be sufficiently determined by the record as it stands. The issue is therefore not properly raised here.

Finally, appellant raises a number of arguments attacking the application of the death penalty statute to his case and the statute's constitutionality. Having carefully reviewed each of these contentions, they are found to be without merit. Appellant's conviction and death sentence are therefore affirmed.

It is so ordered.

BOYD, C.J., and EHRLICH and SHAW, JJ., Concur
OVERTON, J., Concurs specially with an opinion

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

OVERTON, J., concurring specially.

Because this involves the "triggerman" in a contract killing, the death penalty is appropriate. I am concerned, however, that our system of justice has allowed Sweat, who instigated, planned, and directed this murder, to receive total immunity from prosecution for this murder.

An Appeal from the Circuit Court in and for Highlands County,

E. Randolph Bentley, Judge - Case No. CR81-535

Barry Waight, Milton, Massachusetts; and Donald L. Ferguson, Coconut Grove, Florida,

for Appellant

Jim Smith, Attorney General; and Karla J. Staker and Robert J. Krauss, Assistant Attorneys General, Tampa, Florida,

for Appellee

TRIAL COURT'S ORAL RULING ON DEFENDANT'S MOTION TO DISMISS INDICTMENT BECAUSE OF THE STATE'S DESTRUCTION OF EVIDENCE - TRANSCRIPT ON APPEAL, VOL. 1 at 58-60 (JAN. 11, 1984)

THE COURT: Thank you, sir. One thing we have here is a unique situation with a unique set of facts, and it may or may not have a unique law that applies. To me, there's not ever going to be many cases like this. Normally, in a normal criminal charge a Statute of Limitations prevents this sort of problem from coming up or it makes it less likely that it's going to come up. Murder has no Statute of Limitations. There's no social implication behind that decision by the law that all crimes will not have a Statute of Limitations.

I'm drawn back to the underlying purpose of Rules. It's not popular to talk about them any more, I understand, because he's not supposed to know anything. I recommend Blackstone. The Rule says it is by

implication what facts were applied, and there you don't apply it. I think that's the question we have before us.

I have been in complete agreement with the normal Rule and the State destroys evidence in the face of an impending prosecution, either after they have started or knowing they're going to commence it or the police are gathering evidence and sort of beginning, it's out the window. Knowing that they're going to court doesn't much matter. Normally these things are not to be done either to safeguard or to prevent anyone from taking advantage of the destruction of evidence. I think we have a different situtation here.

The question is, does the normal Rule apply under the unique facts of this case? We are talking about such a long passage of time where there is no implication at all that the

action was in bad faith. In fact, it's hard to say if, one, it was initiated by the prosecution or actually done pursuant to the court order.

I'm also impressed by the fact that, although obviously we know in general terms what's missing other than some hypothetical arguments about the bullet, we really haven't pointed to things specifically -- a reproduction of this document isn't sufficient because we need these items because there may well be a point in this trial when some of those items will become apparent that there is prejudice. I note that both sides have a problem in this case because of the passage of time.

When the Legislature said there was no Statute of Limitations on murder, I assume they knew both sides were going to have a time. I think that the law that's been cited

is good law, but I don't think it applies to the facts of this case. I understand there will be certain difficulties. I'm reminded in other areas of law it's specifically said that everyone is entitled to a fair trial, not to a perfect trial. Therefore, I'm going to deny the motion based on the argument that the destruction of records alone constitutes a bar.

FINDINGS OF FACT RE: THE IMPOSITION OF DEATH PENALTY - TRANSCRIPT ON APPEAL, VOL. 6, 1001-1007 (APRIL 2, 1984).

Findings of fact: The Defendant was indicted by the Grand Jury of Highlands County, Florida, for First Degree Murder. Trial by jury was held and the Defendant was found guilty of First Degree Murder.

In a separate proceeding a majority of the trial jury recommended to the Court that the death penalty be imposed on the Defendant as to the offense of Murder in the First Degree.

In making the following findings of fact and conclusions of law the Court has taken into consideration the testimony produced at trial and at the penalty phase.

The Court makes the following findings of fact:

1. As an aggravating circumstance, the Defendant, William Kelley, was previously convicted of a felony involving the use of threat of violence to the person, in that he was convicted of conspiracy to rob in the State of Massachusetts in 1959, and on the same date convicted of robbery. Since these two charges, from their dates, appear to have arisen from the same transaction the Court will consider these as only one crime.

2. As an aggravating circumstance, the capital felony, that is, murder of Mr. Maxcy, was committed for pecuniary gain. The sum of $20,000 was paid to a third man to procure the murder. Mr. Kelley and Mr. Von Etter traveled to Florida and accomplished the killing. There is testimony to the effect that Mr. Kelley received $5,000 of this sum. Even if

the precise amount received is incorrect, the evidence establishes without question that Mr. Kelley's participation was for pecuniary gain.

3. As an aggravating circumstance, the capital felony was a homicide and was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification. Mr. Kelley had never met the victim, Mr. Maxcy. The killing was preceded by telephone calls and a "scouting trip" by Mr. Von Etter. The killing was thoroughly planned in advance. The purpose of the killing was to prevent Mr. Maxcy from disinheriting Irene Maxcy or divorcing her. None of the parties have any pretense of moral or legal justification. This particularly applies to Mr. Kelley and Mr. Von Etter who were hired killers.

4. The other aggravating circumstances are inapplicable in this case.

As to mitigating circumstances, the Court makes the following findings:

1. The Defendant has a significant history of prior criminal activity and therefore this is not a mitigating factor.

In 1963 in federal court he was convicted of 14 counts of forgery of a money order.

In the State of Massachusetts in 1963 he was convicted of two counts of uttering a forged instrument and two counts of theft.

In 1967 he was convicted in the State of Massachusetts of carrying in a vehicle an automatic spring-release knife; unlawful use of an automobile; and possession of burglary tools.

In 1967 in the State of Massachusetts of burglary of a restaurant and possession of burglary tools.

In 1971, he was convicted in the State of Massachusetts of possession of burglary tools and burglary of a dwelling.

In addition, as previously indicated under aggravating circumstances, he was convicted in 1959 in the State of Massachusetts of conspiracy to rob and robbery.

2. There is no evidence that this murder was committed while the Defendant was under the influence of extreme mental or emotional disturbance.

3. There is no evidence that the victim was a participant in the Defendant's conduct or consented to the action.

4. There is no evidence that the Defendant was an accomplice in a capital felony committed by another person and that his participation was relatively minor. It has been argued that it is unknown who

actually murdered Mr. Maxcy. There is credible evidence that the Defendant later said that after he stabbed Mr. Maxcy the victim did not die and that he then shot him. Even if the Court disregarded this statement, the fact remains that Mr. Kelley was one of the two people who entered the house, after which one or both of them murdered Mr. Maxcy. This is in no way a case of an accomplice waiting outside or not actively participating. The Court finds this mitigating circumstance does not apply.

5. There is no evidence that the Defendant acted under extreme duress or under the substantial domination of another person.

6. There is no evidence that the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

7. The Defendant was 23 years of age at the time of this crime, and his age is therefore not a mitigating circumstance.

8. The following other mitigating circumstances have been advanced:

It is contended that Mr. Kelley's prior criminal history is not significant because of its age, the lack of very recent convictions, and because many of the acts are petty criminal acts. The Court disagrees. Mr. Kelley's record begins with robbery in 1959, and ends with burglary of a dwelling in 1971. It includes two burglaries and a robbery in addition to the other enumerated crimes.

It is argued that the sentencing guidelines in effect in the State of Florida discount older crimes. The guidelines do not apply to first-degree murder.

It is contended that the date of the crime is a factor in mitigation. There is no statute of limitations for first-degree murder. Remoteness in time by itself is not a mitigating factor.

It is contended that there is a disparity in punishment in that no one else has been convicted of this crime and that Mr. Kelley was only a tool and not the instigator. Irene Maxcy stood to gain an immense amount of wealth and Mr. Sweet would have benefited greatly. Mr. Sweet was tried once and the jury could not agree. Upon his second trial he was convicted but the appellate court reversed. He was never tried again. Irene Maxcy was tried and convicted for perjury at Mr. Sweet's trial. She was never tried for murder. Mr. Von Etter died by an act of violence not long after this killing.

Although strictly speaking disparity of punishment applies to those convicted of the crime, the Court is troubled by these circumstances. The Court understands the argument that dictates the giving of immunity on occasion so that other guilty parties may be convicted. However, under the circumstances, the Court finds that this is a mitigating factor.

It is contended that the destruction of evidence is a mitigating factor. The legal issue in that regard has already been ruled on by this Court. Over and beyond that, there is no indication that the destruction of evidence years ago affected Mr. Kelley's case. In many instances copies of destroyed documents existed. The most important missing items were the sheet with which the victim was covered and the bullet. The Court is of the

opinion that the missing evidence did not affect or cloud the issues sufficiently to be treated as a mitigating factor.

Finally, it is suggested that Mr. Sweet's character is so bad that this constitutes a mitigating factor. Without question Mr. Sweet is a bad and evil person. The question, however, is whether he is telling the truth or not in this case. The jury, by its verdict, demonstrated that it, like the Court, believes his testimony. This is not a mitigating circumstance.

It is the finding and determination of the Court that as to the charge of first-degree murder the aggravating circumstances substantially outweigh the mitigating circumstances and that therefore the death penalty should be imposed upon the Defendant.

Done this 2nd day of April, 1984, in open court in Highlands County, Florida, E. Randolph Bentley, Circuit Judge.

SUPREME COURT OF THE UNITED STATES

NO. A-964

WILLIAM HAROLD KELLEY,

Applicant,

-v-

FLORIDA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 9, 1986.

/s/ Lewis F. Powell, Jr.
Associate Justice of the
Supreme Court of the
United States

Dated this 11th
day of June, 1986.

86-106

Supreme Court, U.S.
FILED
JUL 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. A-964

In The Supreme Court
of the United States

October Term, 1985

William Harold Kelley,
Petitioner,

-against-

The State of Florida,
Respondent.

Supplemental Appendix to the Petition for a Writ of Certiorari to the Supreme Court of Florida

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Opinion of the Supreme Court
of Florida (Apr. 10, 1986).....SA-1

SUPREME COURT OF FLORIDA

No. 65,134

WILLIAM HAROLD KELLEY, Appellant,

vs.

STATE OF FLORIDA, Appellee.

[April 10, 1986]

ADKINS, J.

William Kelley appeals his conviction for the first-degree murder of Charles V. Maxcy and the death sentence imposed. We have jurisdiction. Art. v. § 3(b)(1), Fla. Const.

Appellant's conviction represented the resolution of a highly unusual case, raising some unusual issues. Appellant was indicted in December of 1981 for the Maxcy murder committed in October of 1966. An explanation of this delay in prosecution requires an examination of

the figures involved and the evidence adduced at appellant's trial.

John Sweet, involved in an illicit love affair with Irene, the victim's wife, planned the murder so that he and she could live together on Maxcy's inheritance. Towards this end, Sweet contacted a Walter Bennett in Massachusetts and made the necessary arrangements. A price was set, and in early October of 1966 appellant Kelley and one Von Etter carried out the sinister task.

Because prosecutors found the evidence insufficient to proceed against appellant and Von Etter, and because Irene Maxcy received immunity in return for her testimony in this case, only Sweet was originally tried. His first trial resulted in a mistrial, and the conviction resulting from his second trial

was reversed on appeal. Sweet v. State, 235 So.2d 40 (Fla. 2d DCA), cert. denied, 239 So.2d 267 (Fla. 1970).

At that point, the state felt unable to proceed against Sweet due to the lapse of time and the loss of certain witnesses' testimony. Thus, the case lay dormant for over ten years. This standstill was broken only after Sweet, in 1981, became involved in a criminal situation he found threatening and approached law enforcement authorities in order to seek some protection by receiving immunity in return for his testimony as to a wide variety of crimes.

It was this testimony upon which appellant's indictment and prosecution in this case were centrally based. Sweet testified as to the details of the planning and execution of the murder, as well as to a purported conversation with appellant several years after

the murder in which appellant allegedly said "Boy, [Maxcy] was a powerful guy. I stabbed him three or four times and he kept coming after us, so I had to shoot him in the head." The other central testimonial evidence presented in appellant's trial below was that of one Abe Namia, a private detective originally hired after the murder by Sweet's defense counsel. Namia testified as to some purported statements of Sweet's made in 1967 incriminating appellant. The statements were admitted to rebut an inference of recent fabrication established by the rigorous cross-examination of Sweet as to his extensive immunity and possible motives to fabricate.

Appellant's first trial ended in a mistrial, the jury unable to agree on a verdict. His second trial began in March of 1984. In the verdict presently appealed, the jury found

Kelley guilty of first-degree murder and recommended the death penalty. In April 1984, the trial judge filed his written findings of fact in support of the death penalty. He found three statutory aggravating circumstances: prior conviction of a violent felony, section 921.141(5)(b), Florida Statutes (1983); homicide commited (sic) for pecuniary gain, section 921.141(5)(f); and homicide committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, section 921.141(5)(i). As a nonstatutory mitigating circumstance he found that appellant was the only participant in the murder to receive punishment.

Appellant raises a number of attacks on the trial of his case and the sentence imposed, alleging a number of prejudicial errors spanning from the time period well before his indictment

to the case's conclusion. These contentions will be explored in the order presented.

Appellant first argues that the state's destruction of the real evidence in the case over five years before his indictment deprived him of due process of law and frustrated the preparation of his defense. In addressing this contention, the unusual procedural history resulting in this problem must be considered.

After the reversal of Sweet's second conviction on appeal, he successfully moved for the dismissal of his indictment. At that point, with no active suspects capable of prosecution, the case file, including the evidence involved, was transmitted to the clerk of the court for maintenance. The evidence there remained until April of 1976, nine and a half years after the murder. At that point the state, at the clerk's request, moved for an order requesting the

court's permission to dispose of the evidence. The state's motion, indicating that "this cause has been disposed of," was granted and the evidence destroyed. The case subsequently lay dormant until Sweet's testimony against appellant Kelley revitalized the prosecution in 1981.

The destroyed evidence which appellant claims may have had particular exculpatory value was real evidence, principally taken from the scene of the crime -- a bullet, a bloody bedsheet purportedly used to subdue the victim during repeated stabbings, and a shred of the victim's shirt. Also destroyed were two handwritten statements by Sweet, which appellant urges would have been useful in impeachment. Copies of the documentary evidence in the case, by far the bulk of the evidence presented at the earlier Sweet trials, were preserved and used

against appellant in the trial below.

Appellant argues that the state's intentional destruction of the evidence of Maxcy's killing over five years before his indictment for a murder committed in 1966 so violated his due process rights that his indictment should have been dismissed. While recognizing that serious constitutional rights are involved in this question, and that the trial of a capital case in the absence of physical evidence raises grave concerns as to fairness, we cannot agree that in this case appellant's due process rights have been violated.

In resolving the serious problems involved when evidence once in the possession of the state is either lost or suppressed, Florida's courts have built their analyses upon the United States Supreme Court's decisions of Brady v.

Maryland, 373 U.S. 83 (1963), and United States v. Agurs, 427 U.S. 97 (1976). Brady laid down the proposition that "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87.

The Agurs Court refined the Brady holding by exploring the concept of constitutional "materiality." The bottom line concern in a suppressed evidence case, the Court made clear, is the justice of the finding of guilt. If, upon consideration of the record as a whole, the omitted evidence creates a reasonable doubt not otherwise existing, the evidence is material and constitutional error has been committed. Due process rights are not violated in every case involving the suppression of evidence.

"The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." 427 U.S. at 109-10.

In State v. Sobel, 363 So.2d 324 (Fla. 1978), this Court utilized that language from Agurs in formulating an analysis applicable to the issue of appropriate sanctions when the state has destroyed evidence. Recognizing that "dismissal of charges against a defendant. . . was an extreme sanction to be utilized with the greatest caution and deliberation," Sobel, 363 So.2d at 327, this Court approved an analysis balancing any negligent or culpable conduct of the prosecutor with any prejudice resulting to the defendant from the destruction of the evidence. Fairness dictated that the burden be placed on the state to prove lack of prejudice

to the defendant, if it so contended.

In Salvatore v. State, 366 So.2d 745 (Fla. 1978), cert. denied, 444 U.S. 885 (1979), we reiterated this balancing standard, implicitly recognizing that each of the factors considered reflected different aspects of the same fundamental concern -- that the defendant received a fair trial. The standard of prejudice which must be met by the defendant, we held, varies inversely with the degree to which the conduct of the trial below has violated fundamental notions of fairness. In Salvatore, finding no negligence on the part of the prosecution, we noted that "[i]t should not be presumed that error injuriously affects the substantial rights of the defendant," 366 So.2d at 751, and found that Salvatore's rights had not been violated by the loss of evidence in the case.

Appellant argues that application of the variable standard analysis established in Sobel and Salvatore to the facts of this case mandates a different result. Because the state-ordered destruction of the evidence was at best inexcusable negligence, it is argued, the conduct of the state weighs heavily towards reversal of the decision below. Citing the lack of a statute of limitations for first-degree murder, and appellant's status as a suspect since the commission of the murder in 1966, appellant urges that the state's destruction of the evidence constituted a breach of its extraordinary duty under these facts.

While we find the destruction of the evidence in this case unfortunate, we cannot read the facts as even hinting at intentional behavior by the state affecting appellant's substantial rights. While extremely hesitant to

condone the state's behavior here, we find no negligence in its actions. Obviously, the state had insufficient evidence to proceed against appellant until Sweet offered his testimony in 1981. The destruction of the evidence took place nearly nine and half years after the state's fruitless efforts to convict Sweet, and five years before appellant's indictment.

In a sense, this is a case of first impression, in which the principles set forth in Brady, Agurs, Sobel and Salvatore are applicable only by analogy. In none of those cases was the lost or destroyed evidence completely unlinked to any active, or even foreseeable, prosecution. On the unusual facts of this case, therefore, the state's behavior may be excused. We wish to emphasize, however, that if even the slightest hint of prosecutorial misconduct was present in the case the result might well be different.

In applying the second prong of the analysis, we find that the state has met its burden of establishing lack of prejudice to the appellant's case. Phrased alternatively, we find that appellant has failed to establish a sufficient degree of prejudice to justify a reversal of his conviction. Demps v. State, 395 So.2d 501, 504 (Fla.), cert. denied, 454 U.S. 933 (1981).

In resolution of this necessarily speculative analysis, appellate courts have tended to defer to the findings of the trial court on the matter. Sobel, 363 So.2d at 328; Smith v. State, 400 So.2d 956 (Fla. 1981); Krantz v. State, 405 So.2d 211, 212 (Fla. 3d DCA 1981); Budman v. State, 362 So.2d 1022 (Fla. 3d DCA 1978). The trial court below specifically found that the destruction of the particular evidence here in question did not prejudice

appellant's case, or create an otherwise non-existent reasonable doubt. In light of the centrality of testimony rather than real evidence in the case, we cannot disagree. We therefore find the denial of appellant's motion to dismiss the indictment proper.

In his second point on appeal, appellant argues that the trial court erred in permitting a witness to testify as to an alleged conversation he had with John Sweet in 1967. The witness, Abe Namia, was a private investigator hired by Sweet's trial counsel after the murder in 1966. During the conversation, Sweet allegedly made some statements which now incriminate appellant. Namia's testimony was admitted below as testimony of prior consistent statements by Sweet, rebutting an inference of recent fabrication or improper motive established in

Sweet's cross-examination.

We reject appellant's contention that Namia's testimony was hearsay and improperly admitted. Defense counsel clearly established an inference of improper motive to fabricate through its extensive cross-examination of Sweet concerning the laundry list of crimes for which he had been given immunity in return for his testimony against Kelley. Appellant does not deny that the jury was left with an impression of Sweet's improper motive to fabricate, Van Gallon v. State, 50 So.2d 882 (Fla. 1951), but argues that Sweet's statements as reported by Namia were not sufficiently consistent with Sweet's testimony at trial to be properly admissible under section 90.801(2)(b), Florida Statutes (1983).

While keeping in mind that "a failure to properly adhere to the requirement of

consistency tends to border on a disregard of the dangers sought to be restrained by the hearsay rule," Sosa v. State, 215 So.2d 736 (Fla. 1968), we find that the two statements concerning the murder varied in only legally insignificant aspects. More troublesome than these minor inconsistencies was the fact that Namia's recollection of Sweet's prior testimony contained certain facts beyond those in Sweet's testimony in chief, which Namia's testimony was admitted to corroborate.

Sweet, according to Namia, had informed Namia that prior to the murder certain unidentified assassins had twice travelled to Florida to kill Maxcy. Although Sweet's testimony in chief did not refer to these shadowy figures, we find that no reversible error was committed in that the additional facts involved were neither highly incriminating nor

critical to the establishment of an ultimate fact in dispute. Sosa, 215 So.2d at 745.

In short, appellant was not prejudiced by the admission of the testimony. We have before held, too, that questions concerning the admissibility of extrajudicial statements for the purpose of rehabilitating witnesses impeached by the inference of a recent motive to fabricate are largely addressed to the sound discretion of the trial court, and are not to be reversed in the absence of a prejudicial abuse of discretion. Sosa, 215 So.2d at 744. See also United States v. DeVore, 423 F.2d 1069, 1073 (4th Cir. 1970), cert. denied, 402 U.S. 950 (1971). We find no such abuse of discretion below, and so reject appellant's argument.

Next, appellant argues that the trial court erred in failing to answer a question addressed to it by the jury during its deliberations.

After several hours of deliberation, the jury announced that it had reached an impasse. Upon receiving an Allen charge, Allen v. United States, 164 U.S. 492 (1896), the jury resumed its deliberations. The interaction in question occurred when the jury subsequently inquired of the court whether "John J. Sweet received immunity in Florida for first degree murder and perjury before he gave information on the Maxcy trial, and if he had anything to gain by his testimony."

The trial court, while aware that Sweet's testimony on cross-examination established the existence of such immunity, declined to explicitly answer the jury's question concerning the crucial issue since formulating an answer would have required him to both interpret Sweet's testimony and make a judgment as to his motivation.

Rather, the trial court offered to the jury to have Sweet's testimony read back in portions designated by the jury. We can see no abuse of discretion in such action. The court's insistence upon the jury's rather than its own choice of the passages to be re-read was proper, in light of the latter's legitimate hesitation to comment upon the evidence. The jury question here involved matters of fact, and this Court has held that a trial judge need answer only questions of law raised by jurors. State v. Ratliff, 329 So.2d 285 (Fla. 1976).

In rejecting appellant's contention that the court below acted improperly in this respect, we finally note that Florida law has given the trial court a wide latitude in deciding whether or not to have testimony re-read to jurors upon request. Fla. R. Cr.P. 3.410; DeCastro v. State, 360 So.2d 474 (Fla. 3d

DCA 1978), cert. denied, 368 So.2d 1365 (Fla. 1979); Simmons v. State, 334 So.2d 265 (Fla. 3d DCA 1976).

In his fourth point on appeal, appellant contends that the trial court erred in allowing the jurors to take notes during the trial and failing to adequately instruct the jury as to the proper role of note-taking. Whether or not a jury is to be allowed to take notes and use them in the deliberation process is a question within the sound discretion of the trial court. United States v. Rhodes, 631 F.2d 43 (5th Cir. 1980); United States v. Riabold, 557 F.2d 697 (10th Cir.), cert. denied, 434 U.S. 860 (1977).

The jurors were informed by the court that note-taking was optional, and instructed that a juror's note-taking in no way gave him or her authority over the others on the panel. We reject appellant's assertion that the jury was

inadequately instructed, noting that no additional or different instructions on the matter were proposed by the defense below.

Next, appellant argues that the trial court erred in admitting certain of his post-arrest statements to FBI agents obtained in violation of his Miranda rights. Miranda v. Arizona, 384 U.S. 436 (1966). Appellant, allegedly in a slightly inebriated condition, was given and examined a Miranda warning form for 15-20 seconds before he returned it, saying "I know my rights." Later in the book-in procedure, appellant learned that he was wanted in Highlands County, Florida, for murder. After an agent commented to appellant "I'm certainly sure that Highlands County is going to place a detainer on you once they know you have been arrested in Florida," appellant made some statements about Maxcy's murder.

We need not reach in this case the validity of the Miranda warnings as given, and the possible effect of appellant's intoxication, in light of our finding that the agent's statement was not an interrogation within Miranda's purview. The statement, in other words, was not a deliberate attempt to elicit an incriminating response, as prohibited by Rhode Island v. Innis, 446 U.S. 291 (1980). The incriminating statements here in question were therefore volunteered, and neither the letter nor spirit of Miranda has been violated. The statements were therefore properly admitted into evidence.

Appellant next mounts an attack on certain instructions given to the jury in an effort to break a deadlock after it had deliberated for several hours and announced that it had reached an impasse. The judge gave Florida Standard Jury Instruction 3.06, the authorized jury

deadlock instruction, and then proceeded to add some comments of his own. These comments, appellant argues, impermissibly misled and so coerced the jury into returning a verdict that appellant was deprived of his right to a fair trial.

As we have recognized, the standard jury instructions should be utilized whenever appropriate, State v. Bryan, 290 So.2d 482 (Fla. 1974); Rigot v. Bucci, 245 So.2d 51 (Fla. 1971), for a trial judge walks a fine line indeed upon deciding to depart. Instructions given to a jury at the extremely sensitive point it has reached a deadlock must be carefully scrutinized, Kozakoff v. State, 323 So.2d 28 (Fla. 4th DCA 1975), cert. denied, 336 So.2d 1184 (Fla. 1976), and the risk is too great that an imprudent instruction may lay to waste the conscientious conduct of an otherwise entirely

fair trial.

While the standard instructions are therefore to be preferred, the trial court's failure to give them does not determine the issue. A court's straying from the standard instructions, we have held, does not require automatic reversal. State v. Bryan, 290 So.2d 482 (Fla. 1974). The analysis is not so simple. We must here join the courts which have scrutinized extemporaneous deadlock instructions with an eye towards ensuring that no false duty to decide was suggested, Nelson v. State, 438 So.2d 1060 (Fla. 4th DCA 1983); Lincoln v. State, 364 So.2d 117 (Fla. 1st DCA 1978), that the verdict returned was not coerced, Jenkins v. United States, 380 U.S. 445 (1965), and that the instructions were "balanced," encouraging neither acquittal nor conviction. State v. Bryan, 290 So.2d 482 (Fla. 1974); Gardner v.

State, 405 So.2d 470 (Fla. 3d DCA 1981).

At this point it may be helpful to consider the actual instructions which appellant here attacks:

> I would ask that you give it your full consideration. It is an important case.
>
> If you fail to reach a verdict, there is no reason to believe the case can be tried again any better or more exhaustively than it has been.
>
> There is no reason to believe there is any more evidence or clearer evidence could be produced on either side. And there is no reason to believe the case could be submitted to twelve more intelligent and impartial people than you are.
>
> In the future a jury would be selected in the same manner that you were.
>
> Therefore, I would ask that you retire at this time and consider whether you wish to consider the matter further.
>
> It has taken us a week to get this far, and I would ask that you retire and consider the case further.

Appellant contends that these instructions so strayed from permissible bounds that the jury was coerced into returning its verdict of guilt, and that the verdict must therefore fall. While reluctant to engage in the speculative analysis of the effect these instructions may have had on the uncertain jury deciding appellant's guilt, we must, and find that caselaw and logic support the appealed conviction.

A fine line must be drawn in such an analysis, but we find that substantially similar instructions have been upheld. United States v. Dixon, 593 F.2d 626 (5th Cir.), cert. denied, 444 U.S. 861 (1979), and that instructions found prejudicial differ in some crucial respects from the instruction given below. Appellant contends, for example, that the result in Nelson v. State, 438 So.2d 1060 (Fla. 4th DCA 1983), should obtain in the instant case. For purposes

of comparison, it will be useful to examine the instructions given in that case:

> I don't think that anybody here would be served by you all not arriving at a verdict. It would be wasting your time for whatever period of time which I guess is . . . seven days now. Nobody can repeat this testimony and exhibits placed before you. If you all cannot arrive at a verdict, then something is wrong. . . . You just don't understand what happens if we had to retry this case. It is not just reproducing the witnesses . . . but it is going through this whole reppertoire [sic] again for you or for someone else when it is really not necessary. You have heard all the law. That is all the evidence there is. That is it as far as what was presented here before you.
>
> We look to you for the resolution of this case. It's that pure and simple. . . .
>
> I can't see that it would be impossible when we have just such a fine jury here.

438 So.2d at 1061.

The Fourth District found these instructions coercive in effect. A close examination of the instructions makes clear the

prejudicial components which rendered the statement as a whole sufficiently coercive to justify the reversal of a first-degree murder conviction.

First, the instructions subverted the proper role of a jury in a capital trial by implying a false duty to reach a verdict in the case. Lincoln v. State, 364 So.2d 117 (Fla. 1st DCA 1978). Second, the jury was left with the impression that failure to return a verdict would constitute waste, and would put the court to a great deal of trouble upon retrial. United States v. Betancourt, 427 F.2d 851 (5th Cir. 1970).

Because the instructions in Nelson "made it appear that unless a verdict was reached . . . the court's confidence in the jury's common sense would somehow have been betrayed," 438 So.2d at 1063, the Fourth District found the

risk unacceptably high that even a single juror may have been influenced to abandon his conscientious belief as to the correctness of his position.

The instructions given in the instant case presented no similar threat to the integrity of the jury system. Rather than demanding a verdict, the judge below demonstrated an attitude represented by his statement, "I would ask that you retire at this time and consider whether you wish to consider the matter further." We also note that the jury continued to deliberate for a considerable period of time after receiving the instruction, returning to ask the court for an unrelated instruction. In sum, while disapproving of such departure from Florida's Standard Jury Instructions, we can find no prejudice resulting from the instructions as given.

In his seventh point on appeal, appellant argues that he was denied his sixth amendment right to the effective assistance of counsel. Generally, such claims are not reviewable on direct appeal but are more properly raised in a motion for post-conviction relief. Perri v. State, 441 So.2d 606 (Fla. 1983); State v. Barber, 301 So.2d 7 (Fla. 1974). Unlike those claims raised under the banner of ineffective assistance which we determined should have been raised on direct appeal in Adams v. State, 456 So.2d 888 (Fla. 1984), the claims here raised by appellant cannot be sufficiently determined by the record as it stands. The issue is therefore not properly raised here.

Finally, appellant raises a number of arguments attacking the application of the death penalty statute to his case and the statute's constitutionality. Having carefully reviewed

each of these contentions, they are found to be without merit. Appellant's conviction and death sentence are therefore affirmed.

It is so ordered.

BOYD, C.J., and EHRLICH and SHAW, JJ., Concur
OVERTON, J., Concurs specially with an opinion

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

OVERTON, J., concurring specially.

Because this involves the "triggerman" in a contract killing, the death penalty is appropriate. I am concerned, however, that our system of justice has allowed Sweet, who instigated, planned, and directed this murder, to receive total immunity from prosecution for this murder.

An Appeal from the Circuit Court in and for Highlands County,

E. Randolph Bentley, Judge - Case No. CR81-535

Barry Haight, Milton, Massachusetts; and Donald L. Ferguson, Coconut Grove, Florida;

for Appellant

Jim Smith, Attorney General; and Karla J. Staker and Robert J. Krauss, Assistant Attorneys General, Tampa, Florida,

for Appellee

86-106 (3)

Supreme Court, U.S.
FILED
AUG 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. A-964

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1985

WILLIAM HAROLD KELLEY,
Petitioner,

-vs-

THE STATE OF FLORIDA,
Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Florida Supreme Court applied a constitutionally impermissible standard in assessing whether the State's destruction of all of the real evidence in the case deprived petitioner of a fair trial.

II. Whether the admission of third party testimony offered by the State to rebut an express or implied charge of recent fabrication or improper motive violated petitioner's constitutional rights to due process and confrontation.

III. Whether in this case the death penalty constitutes cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments.

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The opinion of the Supreme Court of Florida in Kelley v. State is reported at 486 So.2d 578 (Fla. 1986). It is reproduced in the Appendix at A-1, et seq.

JURISDICTION OF THE COURT

To the extent that a substantial federal question may be presented, jurisdiction is properly invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

AMENDMENT XIV

Section I. . . .No State shall make or enforce any law which shlal abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . .to be confronted with the witnesses against him. . .

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

6C FLA. STAT. ANN. §90.801 (WEST 1979)

90.801. Hearsay; definitions; exceptions (2) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is: (b) Consistent with his testimony and is offered to rebut an express or implied charge against him of improper influence, motive, or recent fabrication.

23 FLA. STAT. ANN. §921.141 (WEST 1985)

921.141. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(1) Separate proceedings on issue of penalty -- Upon conviction or adjudication of guilty of a defendant of a capital felony, the court shlal conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s.775.082. The proceeding shlal be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilty of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay

statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury -- After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) Findings in support of sentence of death -- Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) Review of Judgment and Sentence -- The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Flroida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances -- Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) Mitigating circumstances -- Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

STATEMENT OF THE CASE

On October 3, 1966, Charles Von Maxcy was murdered in his home in Sebring, Florida, by petitioner. Maxcy had been stabbed several times and shot in the head.

John J. Sweet was tried twice for that murder, it being the State's contention that Sweet had helped arrange for the murder of Maxcy so that Maxcy's widow, Irene, could inherit Maxcy's considerable wealth. Sweet had been involved in a love affair with Irene Maxcy. Sweet's first trial ended in mistrial where the jury was unable to reach a verdict, and the second trial resulted in the conviction which was overturned on appeal.[1/] At both trials,

1/ Sweet v. State, 235 So.2d 40 (Fla. 2d DCA), cert. denied, 239 So.2d 267 (Fla. 1970).

the State alleged that Sweet had planned the murder but had "hired" William Kelley and Andrew Von Etter to do the actual killing. Upon remand from the appellate court, the State indicated that inability to obtain necessary witnesses made it impossible to try the case again and Sweet's motion for discharge was granted. Thus, although petitioner Kelley was considered a suspect in the murder since the late 1960's, the evidence was insufficient to bring an indictment.

In April, 1976, some nine and one half years after Maxcy's murder, the Clerk of the Tenth Judicial Circuit of Florida in and for Highlands County requested the State Attorney for Highlands County to file a petition for disposal of the evidence being stored for use in the case against Sweet. The Clerk advised that he

needed the storage space and requested disposal of the following evidentiary items: a tire, a white bed sheet, a section of shirt, a bullet and/or slug, and two hand written statements of Sweet (R.1206-1208). The petition for disposal was granted by the Circuit Court on April 30, 1976.

At petitioner Kelley's trial, Sweet testified that after his Florida trials he began selling marijuana for petitioner in Massachusetts (R.668). During this time, Sweet became afraid of petitioner (R.666). At some point, an Arthur Raoul stole some of the marijuana and petitioner thought Sweet had stolen it (R.669). Petitioner severely beat up Sweet and would have killed him but for a companion stopping petitioner by stating, "Bill, no killings tonight. Everyone knows you are here."

(R.669) Petitioner then called Sweet and told him to bring a pistol because, "we are going to Providence, Rhode Island, for Arthur Raoul." (R.667) At that point, Sweet panicked and called his son-in-law, a police officer, who contacted the Massachusetts State Police on Sweet's behalf (R.667). Sweet gave the Massachusetts State Police information about numerous Massachusetts crimes as well as information concerning the Maxcy murder (R.606-607). Although Sweet never asked for immunity (R.614), he was given immunity for numerous Massachusetts offenses as well as for the Maxcy murder and the perjury committed by Sweet in his two Florida trials (R.606,608,614-632). Only as a result of Sweet agreeing to testify was the State able to bring an indictment against petitioner Kelley.

Sweet further testified at petitioner's trial on direct exam that at Irene Maxcy's insistence he made arrangements to have Charles Von Maxcy killed; that the arrangements were made through Walter Bennett of Boston; that petitioner and Von Etter came to Sebring and met with him; and that h drove petitioner and Von Etter to the Maxcy house where they committed the murder (R.579-594). Defense counsel's cross-examination of Sweet raised an express or implied charge of recent fabrication or improper motive (R.611-676), and petitioner has never contended otherwise.

To rehabilitate Sweet, the State presented the testimony of Abe Namia (R.765-772), who testified that before Sweet's first trial Sweet told him that Irene Maxcy asked Sweet if anyone in the Boston area would be interested in doing

some work in Florida; that Sweet related this to Wimpy Bennett; that from that time forward Irene and Bennett talked directly to each other; that unknown assasins came to Florida twice to kill Maxcy but aborted their plans; that eventually petitioner and Von Etter came to Sebring and met with Sweet; and that Sweet drove them to the Maxcy house (R.770-772).

Subsequent to the rendition by the jury of a guilty verdict, the penalty phase commenced. The jury returned, by a vote of 8-3, an advisory sentence recommending that the death penalty be imposed on petitioner. The trial court found three statutory aggravating circumstances, to wit: (1) prior conviction of a violent felony; (2) the homicide was committed for pecuniary gain; and (3) the homicide was committed in a cold, calculated and premeditated manner

without any pretense of moral or legal justification. As a nonstatutory mitigating circumstance the trial court found that the defendant was the only participant in the Maxcy murder to receive punishment.[2/] The trial court imposed a sentence of death upon petitioner.

2/ Irene Maxcy was given immunity to testify at Sweet's trials in Florida; as stated above, Sweet's conviction was reversed and remanded and the State was unable to proceed; Andrew Von Etter was found murdered subsequent to the Maxcy murder.

REASONS WHY THE WRIT SHOULD BE DENIED

POINT I

THE FLORIDA SUPREME COURT APPLIED A CONSTITUTIONALLY PERMISSIBLE STANDARD, IN ACCORD WITH PRIOR RULINGS OF THIS HONORABLE COURT, IN ASSESSING WHETHER THE STATE'S DESTRUCTION OF REAL EVIDENCE DEPRIVED PETITIONER OF A FAIR TRIAL.

Petitioner seeks to have this Honorable Court grant certiorari on the ground that the Florida Supreme Court purportedly applied a constitutionally impermissible standard in determining whether the State's destruction of real evidence in a capital case deprived the petitioner of a fair trial. Respondent asserts that this claim is not worthy of certiorari review by this Honorable Court for the reasons expressed below.

The gravaman of petitioner's claim is

that the Florida Supreme Court focused upon the character of the State's conduct in destroying real evidence rather than upon the materiality of the evidence, and hence the prejudice to the defendant. Petitioner contends that the Florida Supreme Court's "variable analysis test" is unconstitutionally stringent by requiring a defendant to show greater prejudice where the government has not acted in bad faith. It is significant to note, however, that this claim was never presented to the Florida Supreme Court. Rather, in his briefs and in oral argument before the Florida Supreme Court, petitioner argued that application of the variable standard analysis established by the Florida Supreme Court in State v. Sobel, 363 So.2d 324 (Fla. 1978), and Salvatore v. State, 366 So.2d 745 (Fla. 1978), cert. denied, 444 U.S. 885 (1979),

to the facts of the instant case required a conclusion that petitioner was denied his right to a fair trial due to the State's destruction of evidence. Thus, petitioner's newly-articulated contention that the Florida Supreme Court applies an unconstitutionally stringent test was never asserted by petitioner nor passed upon by the Florida Supreme Court. It is apparent that petitioner is changing the basis of his claim in his petition for writ of certiorari where this newly-articulated ground was not raised in the state court. Cf. Cardinale v. Louisiana, 394 U.S. 437 (1969). Your respondent asserts that a theory not asserted before a state court is not cognizable before this Honorable Court.

In addition to the non-assertion by petitioner of the theory now advanced before this court it is apparent that the

Florida Supreme Court's decision is consistent with this Honorable Court's decisions in Brady v. Maryland, 373 U.S. 83 (1963), United States v. Agurs, 427 U.S. 97 (1976), and California v. Trombetta, 467 U.S. 479 (1984). Of course, Brady and Agurs are "suppression" cases whereas Trombetta is a decision of this Honorable Court pertaining to evidence which has not been "preserved" by the State. It is significant to note that in Trombetta, this Honorable Court placed emphasis upon the "good faith" of the State authorities where this Court noted that the authorities did not destroy breath samples in a calculated effort to circumvent the due process requirement of Brady. In the instant case, the Florida Supreme Court made a specific finding that there was not even a hint of bad faith by the Florida prosecuting authorities. In

distinguishing Brady and Agurs, the Florida Supreme Court noted that, "In none of those cases was the lost or destroyed evidence completely unlinked to any active, or even forseeable prosecution." The unusual facts of the instant case as related above in the Statement of the Case supply ample justification for this Honorable Court to decline to exercise its certiorari jurisdiction.

Additionally, petitioner has never established that the excluded evidence was "constitutionally material". If there is a duty imposed by the United States Constitution on the states to preserve evidence, that duty is limited to evidence which possesses an exculpatory value that was apparent before the evidence was destroyed, and the evidence must be of such a nature that the defendant would be unable to obtain comparable evidence by

other reasonably available means. This test of materiality as enunciated in Trombetta is similar to the test of materiality announced in Agurs, supra. In accordance with Agurs, the Florida Supreme Court recognized that the trial court in the instant case "specifically found that the destruction of the particular evidence here in question did not prejudice appellant's case, or create an otherwise non-existent reasonable doubt." Therefore, by recognizing that the governmental officials acted in good faith and by further recognizing that no prejudice ensued to petitioner, the Florida Supreme Court has applied the proper standard in assessing the destruction of evidence claim.

The record of the instant cause which was reviewed by the Florida Supreme Court reveals that petitioner's claim of

destruction of evidence was properly adjudicated by the Florida state courts. The exhibits which were destroyed were only the State exhibits from the Sweet trials. The defense exhibits were still available at the Clerk's office. Approximately 90 percent of the evidence which was destroyed was documentary evidence, copies of which were available for use by the defense. There was never a showing by petitioner that the test results obtained for the Sweet trials could not be used by petitioner's defense team - the lab reports pertaining to the sheet and other items of other physical evidence were available (R.69-70, 76).

In his petition for writ of certiorari, petitioner focuses upon the bed sheet which was found outside the bedroom where Maxcy's body had been found. At trial, it was petitioner's theory that

he could not have been responsible for Maxcy's death inasmuch as he was seen shortly after the homicide with no blood on his clothes. Testimony at trial indicated that there was considerable blood in the bedroom and hallway indicating that a struggle had occurred. To rebut this theory, the State contended that the sheet was wrapped around the victim before he was stabbed to absorb the blood. Applying the test of constitutional materiality as enunciated in Trombetta, it is apparent that petitioner could not demonstrate prejudice. Petitioner's claim that the bed sheet had an exculpatory value is tenuous and any exculpatory value would not have been apparent before the items were destroyed. More importantly, the defense team was able to obtain comparable evidence to support its "blood on the

killers" theory where, as aforestated, there was testimony revealing that considerable blood was found in the bedroom and hallway. Further, the medical examiner testified that the victim had been able to struggle for minutes after being stabbed, that his heart would have continued to pump blood during a struggle, and that Maxcy's body had skin abraisions on it. Combined with the fact that the lab reports pertaining to the sheets were available for use by the defense, it is apparent that comparable evidence was available to support the defense theory. With respect to all the evidence from the Sweet trial which was destroyed by the State, petitioner has never demonstrated that those exhibits possessed an exculpatory value that was apparent before the evidence was destroyed and was of such a nature that the defendant would be

unable to obtain comparable evidence by other means.

The instant case is unusual in that a prosecution would never have ensued against petitioner had not petitioner severely beaten John J. Sweet and caused Sweet to panic and seek the aid of law enforcement officials in Massachusetts and Florida. The State had preserved all items of evidence for more than nine and one half years subsequent to Maxcy's murder, including approximately 5 years after Sweet had been discharged. At the time the items were destroyed, there was no active prosecution or investigation nor was it forseeable that the master-mind of the murder would step forward after 15 years due to his fear of petitioner. Confronted with these unusual facts, the Florida Supreme Court applied the proper standard in assessing petitioner's destruction of evidence claim.

POINT II

THE ADMISSION OF THIRD PARTY TESTIMONY TO REBUT AN EXPRESS OR IMPLIED CHARGE OF RECENT FABRICATION OR IMPROPER MOTIVE DID NOT VIOLATE PETITIONER'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND CONFRONTATION.

Petitioner's second point involves the use by the State of a witness to rehabilitate the State's chief witness, John J. Sweet. It has never been contended that during defense counsel's vigorous cross-examination of Sweet an express or implied charge of recent fabrication or improper motive was raised. Therefore, to rehabilitate Sweet, the State presented the testimony of Abe Namia, a private investigator who was hired by John Sweet's attorney after Sweet was charged with the murder of Charles Von Maxcy. Your respondent has set forth the testimony of Sweet and Namia in our

Statement of the Case, supra, and, therefore, for the sake of brevity, requests this Honorable Court to refer to that Statement of the Case. A review of that testimony reveals that the trial court did not abuse its discretion by permitting the testimony of Abe Namia.

Petitioner's primary concern with the admission of Namia's testimony hinges upon the fact that Sweet denied ever making any statements to Namia. Thus, petitioner reasons, testimony should not be admitted as prior consistent statements where the declarant denies ever making the statements. However, this claim that there must be a foundation by eliciting the declarant's testimony that he made prior consistent statements is unsupported by any authority. The Florida Supreme Court correctly ruled that Namia's statements were sufficiently consistent

with Sweet's testimony to be admissible to rebut an inference of recent fabrication or improper motive. In United States v. DeVore, 423 F.2d 1069 (4th Cir. 1970), cert. denied, 402 U.S. 950 (1971), the trial court had excluded rehabilitative testimony relating to a specific incident because the witness being rehabilitated had not testified to the same incident. The Fourth Circuit found that the testimony was admissible as a prior consistent statement designed to corroborate the witness's entire story.3/ Similarly, in the instant case, the Florida Supreme Court has correctly ruled that Namia's testimony was admissible as a prior consistent statement

3/ However, because the court could not say that the trial judge's ruling constituted an abuse of discretion, the judgment was affirmed.

designed to corroborate the witness's entire story. Indeed, a comparison of the testimony of Sweet and Namia reveals that the two stories were substantially consistent so as to render Namia's rehabilitative testimony admissible. Here, Sweet was vigorously cross-examined to such an extent that the introduction of Namia's testimony was necessary to rehabilitate Sweet. No right of confrontation was abridged where Sweet and Namia were available for, and indeed subjected to, vigorous cross-examination. This Honorable Court should decline to exercise its certiorari jurisdiction where the Florida Supreme Court properly ruled that the trial court did not abuse its discretion in permitting prior consistent statements admitted to rebut an express or implied charge of recent fabrication or improper motive.

POINT III

THE DEATH PENALTY RECEIVED BY PETITIONER WAS IMPOSED IN ACCORDANCE WITH CONSTITUTIONALLY PERMISSIBLE STANDARDS.

Petitioner also seeks certiorari based upon his assertion that the death penalty imposed in the instant case constitutes cruel and unusual punishment. His claims, however, have either been affirmatively rejected by state and federal courts or have not even been properly presented so as to enable this Honorable Court to exercise its certiorari jurisdiction.

Petitioner claims that he has properly asserted a claim that the Florida death penalty statute is unconstitutional because the death penalty is imposed unevenly on the basis of the race of the victim. He notes that this Honorable

Court has accepted jurisdiction in a Florida case, Hitchcock v. Wainwright, No. 85-6756, cert. granted, 54 U.S.L.W. 3809 (Supreme Court June 9, 1986). Hitchcock is simply inapposite to the instant case. The Hitchcock issue concerns the necessity for an evidentiary hearing in a federal court as to the race of the victim, i.e., whether statistical evidence supports the assertion that the Florida death penalty is imposed unevenly on the basis of the race of the victim. In the instant case, petitioner has never requested a hearing on this issue nor has he deemed this issue significant to the extent of presenting any motion to the state courts on this ground. Rather, petitioner submitted a short, conclusory allegation in his brief before the Florida Supreme Court. The record of the instant case reveals that no motion was either filed or argued before

the trial court concerning this claim. Thus, the issue has not even been preserved and, therefore, is not in the same posture as Hitchcock. This Honorable Court should decline to exercise its certiorari jurisdiction where a petitioner has failed to present this claim in the proper fashion to the state courts for resolutiuon.

Also, this Honorable Court has rejected the claim that Florida unconstitutionally applies the death penalty more often when the victim is white than when the victim is black. See, Sullivan v. Wainwright, 464 U.S. 109 (1983); Booker v. Wainwright, 764 F.2d 1371 (11th Cir. 1985), cert. denied, 106 S.Ct. 339 (1985).

Petitioner also complains that the Florida death penalty statute provides for arbitrary and capricious imposition of the

death penalty. In particular, petitioner complains that two of the three aggravating circumstances found by the trial court were essentially the same. He argues that a murder committed for pecuniary gain and a murder committed in a cold, calculated manner without any pretense of moral or legal justification are essentially the same conduct and cannot be used separately to aggravate a murder. This contention is simply without foundation. In the instant case, the trial judge found the aggravating circumstances of pecuniary gain where petitioner was hired and paid to commit a murder. The trial judge further found that the murder was cold, calculated and premeditated based on evidence that the murder was dispassionately conceived and planned. Thus, <u>different aspects</u> of the murder were considered and there was no

improper doubling of aggravating circumstances. See, Squires v. State, 450 So.2d 208 (Fla. 1984); Agan v. State, 445 So.2d 326 (Fla. 1983).

In a general allegation, petitioner claims that Florida's statutory scheme is infirm in that it is incapable of avoiding arbitrary and capricious infliction of the death penalty. In support of his proposition, he relies on Godfrey v. Georgia, 446 U.S. 420 (1980). In Godfrey, this Honorable Court determined that because an unconstitutional aggravating circumstance was considered by the Georgia courts, imposition of the death penalty for Godfrey's crimes was unconstitutional. However, Florida's aggravating circumstances have been repeatedly upheld by this Honorable Court. See, e.g., Proffitt v. Wainwright, 428 U.S. 242 (1976). Thus, petitioner has not alleged,

either before this Honorable Court or before the state courts, a basis for the assertion that Florida's death penalty scheme is invalid.

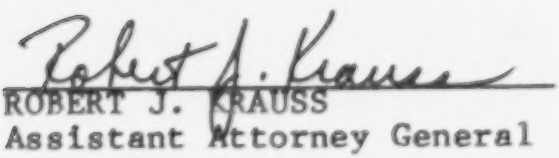
In the instant case, three aggravating circumstances were properly found by the trial court which were balanced against the mitigating finding of the trial court that petitioner is the only person who has received punishment in the Maxcy murder. The imposition of the death penalty in the instant case was done so following established precedent in accordance with the dictates of this Honorable Court. There is no constitutional infirmity present to justify the exercise by this Honorable Court of its certiorari jurisdiction.

CONCLUSION

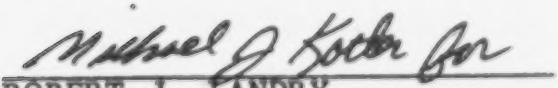
The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



ROBERT J. KRAUSS
Assistant Attorney General



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CERTIFICATE OF SERVICE

I, ROBERT J. LANDRY, counsel for respondent, and a member of the Bar of the United States Supreme Court, hereby certify that on the 5th day of August, 1986, I served three copies of the Response in Opposition to Petition for Writ of Certiorari on Allen M. Dershowitz, 232 Brattle Street, Cambridge, MA 02138, by a duly addressed envelope with postage prepaid.

Michael A. Kotler for

ROBERT J. LANDRY
Assistant Attorney General
COUNSEL FOR RESPONDENT

APPENDIX

SUPREME COURT OF FLORIDA

No. 65,134

WILLIAM HAROLD KELLEY, Appellant,

vs.

STATE OF FLORIDA, Appellee.

[April 10, 1986]

ADKINS, J.

William Kelley appeals his conviction for the first-degree murder of Charles V. Maxcy and the death sentence imposed. we have jurisdiction. Art. V, §3(b)(1), Fla. Const.

Appellant's conviction represented the resolution of a highly unusual case, raising some unusual issues. Appellant was indicted in December of 1981 for the Maxcy murder, committed in October of 1966. An explanation of this delay in prosecution requires an examination of the figures involved and the evidence adduced at appellant's trial.

John Sweet, involved in an illicit love affair with Irene, the victim's wife, planned the murder so that he and she could live together on Maxcy's inheritance. Towards this end, Sweet contacted a Walter Bennett in Massachusetts and made the necessary arrangements. A price was set, and in early October of 1966 appellant Kelley and one Von Etter carried out the sinister task.

Because prosecutors found the evidence insufficient to proceed against appellant and Von Etter, and because Irene Maxcy received immunity in return for her testimony in the case, only Sweet was originally tried. His first trial resulted in a mistrial, and the conviction resulting from his second trial was reversed on appeal. Sweet v. State, 235 So.2d 40 (Fla. 2d DCA), cert. denied, 239 So.2d 267 (Fla. 1970).

At that point, the state felt unable to proceed against Sweet due to the lapse of time and the loss of certain witnesses' testimony. Thus, the case lay dormant for over ten years. This standstill was broken only after Sweet, in 1981, became

threatening and approached law enforcement authorities in order to seek some protection by receiving immunity in return for his testimony as to a wide variety of crimes.

it was this testimony upon which appellant's indictment and prosecution in this case were centrally based. Sweet testified as to the details of the planning and execution of the murder, as well as to a purported conversation with appellant several years after the murder in which appellant allegedly said "Boy, [Maxcy] was a powerful guy. I stabbed him three or four times and he kept coming after us, so I had to shoot him in the head." The other central testimonial evidence presented in appellant's trial below was that of one Abe Namia, a private detective originally hired after the murder by Sweet's defense counsel. Namia testified as to some purported statements of Sweet's made in 1967 incriminating appellant. The statements were admitted to rebut an inference of recent fabrication established by the rigorous cross-examination of Sweet as to his extensive immunity and possible motives to fabricate.

Appellant's first trial ended in a mistrial, the jury unable to agree on a verdict. His second trial began in March of 1984. In the verdict presently appealed, the jury found Kelley guilty of first-degree murder and recommended the death penalty. In April 1984, the trial judge filed his written findings of fact in support of the death penalty. He found three statutory aggravating circumstances: prior conviction of a violent felony, section 921.141(5)(b), Florida Statutes (1983); homicide committed for pecuniary gain, section 921.141(5))f); and homicide committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, section 921.141(5)(i). As a nonstatutory mitigating circumstance he found that appellant was the only participant in the murder to receive punishment.

Appellant raises a number of attacks on the trial of his case and the sentence imposed, alleging a number of prejudicial errors spanning from the time period well before his indictment to the case's conclusion. These contentions will be explored in the order presented.

Appellant first argues that the state's destruction of the real evidence in the case over five years before his indictment deprived him of due process of law and frustrated the preparation of his defense. In addressing this contention, the unusual procedural history resulting in this problem must be considered.

After the reversal of Sweet's second conviction on appeal, he successfully moved for the dismissal of his indictment. At that point, with no active suspects capable of prosecution, the case file, including the evidence involved, was transmitted to the clerk of the court for maintenance. The evidence there remained until April of 1976, nine and a half years after the murder. At that point the state, at the clerk's request, moved for an order requesting the court's permission to dispose of the evidence. The state's motion, indicating that "this cause has been disposed of," was granted and the evidence destroyed. The case subsequently lay dormant until Sweet's testimony against appellant Kelley revitalized the prosecution in 1981.

The destroyed evidence which appellant claims may have had particular exculpatory value was real evidence, principally taken from the scene of the crime -- a bullet, a bloody bedsheet purportedly used to subdue the victim during repeated stabbings, and a shred of the victim's shirt. Also destroyed were two handwritten statements by Sweet, which appellant urges would have been useful in impeachment. Copies of the documentary evidence in the case, by far the bulk of the evidence presented at the earlier Sweet trials, were preserved and used against appellant in the trial below.

Appellant argues that the state's intentional destruction of the evidence of Maxcy's killing over five years before his indictment for a murder committed in 1966 so violated his due process rights that his indictment should have been dismissed.

While recognizing that serious constitutional rights are involved in this question, and that the trial of a capital case in the absence of physical evidence raises grave concerns as to fairness, we cannot agree that in this case appellant's due process rights have been violated.

In resolving the serious problems involved when evidence once in the possession of the state is either lost or suppressed, Florida's courts have built their analyses upon the United States Supreme Court's decisions of Brady v. Maryland, 373 U.S. 83 (1963), and United States v. Agurs, 427 U.S. 97 (1976). Brady laid down the proposition that "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilty of punishment, irrespective of the good faith or bad faither of the prosecution." 373 U.S. at 87.

The Agurs Court refined the Brady holding by exploring the concept of constitutional "materiality." The bottom line concern in a suppressed evidence case, the Court made clear, is the justice of the finding of guilt. If, upon consideration of the record as a whole, the omitted evidence creates a reasonable doubt not otherwise existing, the evidence is material and constitutional error has been committed. Due process rights are not violated in every case involving the

suppression of evidence. "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." 427 U.S. at 109-10.

In State v. Sobel, 363 So.2d 324 (Fla. 1978), this Court utilized that language from Agurs in formulating an analysis applicable to the issue of appropriate sanctions when the state has destroyed evidence. Recognizing that "dismissal of charges against a defendant. . .was an extreme sanction to be utilized with the greatest caution and deliberation," Sobel, 363 So.2d at 327, this Court approved an analysis balancing any negligent or culpable conduct of the prosecutor with any prejudice resulting to the defendant from the destruction of the evidence. Fairness dictated that the burden be placed on the state to prove lack of prejudice to the defendant, if it so contended.

In Salvatore v. State, 366 So.2d 745 (Fla. 1978), cert. denied, 444 U.S. 885 (1979), we reiterated this balancing

standard, implicitly recognizing that each of the same fundamental concern -- that the defendant received a fair trial. The standard of prejudice which must be met by the defendant, we held, varies inversely with the degree to which the conduct of the trial below has violated fundamental notions of fairness. In Salvatore, finding no negligence on the part of the prosecution, we noted that "[i]t should not be presumed that error injuriously affects the substantial rights of the defendant," 366 So.2d at 751, and found that Salvatore's rights had not been violated by the loss of evidence in the case.

Appellant argues that application of the variable standard analysis established in Sobel and Salvatore to the facts of this case mandates a different result. Because the state-ordered destruction of the evidence was at best inexcusable negligence, it is argued, the conduct of the state weighs heavily towards reversal of the decision below. Citng the lack of a statute of limitations for first-degree murder, and appellant's status as a suspect since the commission of the murder

in 1966, appellant urges that the state's destruction of the evidence constituted a breach of its extraordinary duty under these facts.

While we find the destruction of the evidence in this case unfortunate, we cannot read the facts as even hinting at intentional behavior by the state affecting appellant's substantial rights. While extremely hesitant to condone the state's behavior here, we find no negligence in its actions. Obviously, the state had insufficient evidence to proceed against appellant until Sweet offered his testimony in 1981. The destruction of the evidence took place nearly nine and a half years after the state's fruitless efforts to convict Sweet, and five years before appellant's indictment.

In a sense, this is a case of first impression, in which the principles set forth in Brady, Agurs, Sobel and Salvatore are applicable only by analogy. In none of those cases was the lost or destroyed evidence completely unlinked to any active, or even foreseeable, prosecution. On the unusual facts of this case,

therefore, the state's behavior may be excused. We wish to emphasize, however, that if even the slightest hint of prosecutorial misconduct was present in the case the result might well be different.

In applying the second prong of the analysis, we find that the state has met its burden of establishing lack of prejudice to the appellant's case. Phrased alternatively, we find that appelalnt has failed to establish a sufficient degree of prejudice to justify a reversal of his conviction. Demps v. State, 395 So.2d 501, 504 (Fla.), cert. denied, 454 U.S. 933 (1981).

In resolution of this necessarily speculative analysis, appellate courts have te4nded to defer to the findings of the trial courts on the matter. Sobel, 363 So.2d at 328, Smith v. State, 400 So.2d 956 (Fla. 1981); Krantz v. State, 405 So.2d 211, 212 (Fla. 3d DCA 1981); Budman v. State, 362 So.2d 1022 (Fla. 3d DCA 1978). The trial court below specifically found that the destruction of the particular evidence here in question did not prejudice appellant's case, or

create an otherwise non-existent reasonable doubt. In light of the centrality of testimony rather than real evidence in the case, we cannot disagree. We therefore find the denial of appellant's motion to dismiss the indictment proper.

In his second point on appeal, appellant argues that the trial court erred in permitting a witness to testify as to an alleged conversation he had with John Sweet in 1967. The witness, Abe Namia, was a private investigator hired by Sweet's trial counsel after the murder in 1966. During the conversation, Sweet allegedly made some statements which now incriminate appellant. Namia's testimony was admitted below as testimony of prior consistent statements by Sweet, rebutting an inference of recent fabrication or improper motive established in Sweet's cross-examination.

We reject appellant's contention that Namia's testimony was hearsay and improperly admitted. Defense counsel clearly established an inference of improper motive to fabricate through its extensive cross-examination of Sweet

concerning the laundry list of crimes for which he had been given immunity in return for his testimony against Kelley. Appellant does not deny that the jury was left with an impression of Sweet's improper motive to fabricate, Van Gallon v. State, 50 So.2d 882 (Fla. 1951), but argues that Sweet's statements as reported by Namia were not sufficiently consistent with Sweet's testimony at trial to be properly admissible under section 90.801(2)(b), Florida Statutes (1983).

While keeping in mind that "a failure to properly adhere to the requirement of consistency tends to border on a disregard of the dangers sought to be restrained by the hearsay rule," Sosa v. State, 215 So.2d 736 (Fla. 1968), we find that the two statements concerning the murder varied in only legally insignificant aspects. More troublesome than these minor inconsistencies was the fact that Namia's recollection of Sweet's prior testimony contained certain facts beyond those in Sweet's testimony in chief, which Namia's testimony was admitted to corroborate.

Sweet, according to Namia, had informed Namia that prior to the murder certain unidentified assassins had twice travelled to Florida to kill Maxcy. Although Sweet's testimony in chief did not refer to these shadowy figures, we find that no reversible error was committed in that the additional facts involved were neither highly incriminating nor critical to the establishment of a ultimate fact in dispute. Sosa, 215 So.2d at 745.

In short, appellant was not prejudiced by the admission of the testimony. We have before held, too, that questions concerning the admissibility of extrajudicial statements for the purpose of rehabilitating witnesses impeached by the inference of a recent motive to fabricate are largely addressed to the sound discretion of the trial court, and are not to be reversed in the absence of a prejudicial abuse of discretion. Sosa, 215 So.2d at 744. See also United States v. DeVore, 423 F.2d 1069, 1073 (4th Cir. 1970), cert. denied, 402 U.S. 950 (1971). We find no such abuse of discretion below, and so reject appellant's argument.

Next, appellant argues that the trial court erred in failing to answer a question addressed to it by the jury during its deliberations. After several hours of deliberation, the jury announced that it had reached an impasse. Upon receiving an Allen charge, Allen v. United States, 164 U.S. 492 (1896), the jury resumed its deliberations. The interaction in question occurred when the jury subsequently inquired of the court whether "John J. Sweet received immunity in Florida for first degree murder and perjury before he gave information on the Maxcy trial, and if he had anything to gain by his testimony."

The trial court, while aware that Sweet's testimony on cross-examination established the existence of such immunity, declined to explicitly answer the jury's question concerning the crucial issue since formulating an answer would have required him to both interpret Sweet's testimony and make a judgment as to his motivation.

Rather, the trial court offered to the jury to have Sweet's testimony read back in portions designated by the jury.

We can see no abuse of discretion in such action. The court's insistence upon the jury's rather than its own choice of the passages to be re-read was proper, in light of the latter's legitimate hesitation to comment upon the evidence. The jury question here involved matters of fact, and this Court has held that a trial judge need answer only questions of law raised by jurors. State v. Ratliff, 329 So.2d 285 (Fla. 1976).

In rejecting appellant's contention that the court below acted improperly in this respect, we finally note that Florida law has given the trial court a wide latitude in deciding whether or not to have testimony re-read to jurors upon request. Fla. R. Cr. P. 3.410; DeCastro v. State, 360 So.2d 474 (Fla. 3d DCA 1978), cert. denied, 368 So.2d 1365 (Fla. 1979); Simmons v. State, 334 So.2d 265 (Fla. 3d DCA 1976).

In his fourth point on appeal, appellant contends that the trial court erred in allowing the jurors to take notes during the trial and failing to adequately instruct the jury as to the proper role of note-taking. Whether or not a jury is to

be allowed to take notes and use them in the deliberation process is a question within the sound discretion of the trial court. United States v. Rhodes, 631 F.2d 43 (5th Cir. 1980); United States v. Riebold, 557 F.2d 697 (10th Cir.), cert. denied, 434 U.S. 860 (1977).

The jurors were informed by the court that note-taking was optional, and instructed that a juror's note-taking in no way gave him or her authority over the others on the panel. We reject appelalnt's assertion that the jury was inadequately instructed, noting that no additional or different instructions on the matter wre proposed by the defense below.

Next, appellant argues that the trial court erred in admitting certain of his post-arrest statements to FBI agents obtained in violation of his Miranda rights. Miranda v. Arizona, 384 U.S. 436 (1966). Appellant, allegedly in a slightly inebriated condition, was given and examined a Miranda warning form for 15-20 seconds before he returned it, saying "I know my rights." Later in the book-in procedure, appellant learned that

he was wanted in Highlands County, Florida, for murder. After an agent commented to appelant "I'm certainly sure that Highlands County is going to place a detainer on you once they know you have been arrested in Florida," appellant made some statements about Maxcy's murder.

We need not reach in this case the validity of the Miranda warnings as given, and the possible effect of appellant's intoxication, in light of our finding that the agent's statement was not an interrogation within Miranda's purview. The statement, in other words, was not a deliberate attempt to elicit an incriminating response, as prohibited by Rhode Island v. Innis, 446 U.S. 291 (1980). The incriminating statements here in question were therefore volunteered, and neither the letter nor spirit of Miranda has been violated. The statements were therefore properly admitted into evidence.

Appellant next mounts an attack on certain instructions given to the jury in an effort to break a deadlock after it had deliberated for several hours and announced that it had reached an impasse.

The judge gave Florida Standard Jury Instruction 3.06, the authorized jury deadlock instruction, and then proceeded to add some comments of his own. These comments, appellant argues, impermissibly misled and so coerced the jury into returning a verdict that appellant was deprived of his right to a fair trial.

As we have before recognized, the standard jury instructions should be utilized whenever appropriate, State v. Bryan, 290 So.2d 482 (Fla. 1974); Rigot v. Bucci, 245 So.2d 51 (Fla. 1971), for a trial judge walks a fine line indeed upon deciding to depart. Instructions given to a jury at the extremely sensitive point it has reached a deadlock must be carefully scrutinized, Kozakoff v. State, 323 So.2d 28 (Fla. 4th DCA 1975), cert. denied, 336 So.2d 1184 (Fla. 1976), and the risk is too great that an imprudent instruction may lay to waste the conscientious conduct of an otherwise entirely fair trial.

While the standard instructions are therefore to be preferred, the trial court's failure to give them does not determine the issue. A court's straying from the standard instructions, we have

held, does not require automatic reversal. State v. Bryan, 290 So.2d 482 (Fla. 1974). The analysis is not so simple. We must here join the courts which have scrutinized extemporaneous deadlock instructions with an eye towards ensuring that no false duty to decide was suggested, Nelson v. State, 438 So.2d 1060 (Fla. 4th DCA 1983); Lincoln v. State, 364 So.2d 117 (Fla. 1st DCA 1978), that the verdict returned was not coerced, Jenkins v. United States, 380 U.S. 445 (1965), and that the instructions were "balanced," encouraging neither acquittal nor conviction. State v. Bryan, 290 So.2d 482 (Fla. 1974); Gardner v. State, 405 So.2d 470 (Fla. 3d DCA 1981).

At this point it may be helpful to consider the actual instructions which appellant here attacks:

> I would ask that you give it your full consideration. It is an important case.
>
> If you fail to reach a verdict, there is no reason to believe the case can be tried again any better or more exhaustively than it has been.

> There is no reason to believe there is any more evidence or clearer evidence could be produced on either side. And there is no reason to believe the case could be submitted to twelve more intelligent and impartial people than you are.
>
> In the future a jury would be selected in the same manner that you were.
>
> Therefore, I would ask that you retire at this time and consider whether you wish to consider the matter further.
>
> It has tkane us a week to get this far, and I would ask that you retire and consider the case further.

Appellant contends that these instructions so strayed from permissible bounds that they jury was coerced into returning its verdict of guilt, and that the verdict must therefore fall. While reluctant to engage in the speculative analysis of the effect these instructions may have had on the uncertain jury deciding appellant's guilt, we must, and find that caselaw and logic support the appealed conviction.

A fine line must be drawn in such an analysis, but we find that substantially similar instructions have been upheld, United States v. Dixon, 593 F.2d 626 (5th Cir.), cert. denied, 444 U.S. 861 (1979), and that instructions found prejudicial differ in some crucial respects from the instruction given below. Appellant contends, for example, that the result in Nelson v. State, 438 So.2d 1060 (Fla. 4th DCA 1983), should obtain in the instant case. For purposes of comparison, it will be useful to examine the instructions given in that case:

> I don't think that anybody here would be served by you all not arriving at a verdict. It would be wasting your time for whatever period of time which I guess is . . . seven days now. Nobody can repeat this testimony and exhibits placed before you. If you all cannot arrive at a verdict, then something is wrong . . . You just don't understand what happens if we had to retry this case. It is not just reproducing the witnesses . . . but it is going through this whole reppertoire [sic] again for you or for someone else when it is really not necessary. You have herad all the law. That is all the evidence there is. That is it as far as what was presented here before you.

> We look to you for the resolution of this case. It's that pure and simple. . . .
>
> I can't see that it would be impossible when we have just such a fine jury here.

438 So.2d at 1061.

The Fourth District found these instructions coercive in effect. A close examination of the instructions makes clear the prejudicial components which rendered the statement as a whole sufficiently coercive to justify the reversal of a first-degree murder conviction.

First, the instructions subverted the proper role of a jury in a capital trial by implying a false duty to reach a verdict in the case. Lincoln v. State, 364 So.2d 117 (Fla. 1st DCA 1978). Second, the jury was left with the impression that failure to return a verdict would constitute waste, and would put the court to a great deal of trouble upon retrial. United States v. Betancourt, 427 F.2d 851 (5th Cir. 1970).

Because the instructions in Nelson "made it appear that unless a verdict was reached . . . the court's confidence in

the jury's common sense would somehow have been betrayed," 438 So.2d at 1063, the Fourth District found the risk unacceptably high that even a single juror may have been influenced to abandon his conscientious belief as to the correctness of his position.

The instructions given in the instant case presented no similar threat to the integrity of the jury system. Rather than demanding a verdict, the judge below demonstrated an attitude represented by his statement, "I would ask that you retire at this time and consider whether you wish to consider the matter further." We also note that the jury continued to deliberate for a considerable period of time after receiving the instruction, returning to ask the court for an unrelated instruction. In sum, while disapproving of such departure from Florida's Standard Jury Instructions, we can find no prejudice resulting from the instructions as given.

In his seventh point on appeal, appellant argues that he was denied his sixth amendment right to the effective assistance of counsel. Generally, such

claims are not reviewable on direct appeal but are more properly raised in a motion for post-conviction relief. Perri v. State, 441 So.2d 606 (Fla. 1983); State v. Barber, 301 So.2d 7 (Fla. 1974). Unlike those claims raised under the banner of ineffective assistance which we determined should have been raised on direct appeal in Adams . State, 456 So.2d 888 (Fla. 1984), the claims here raised by appellant cannot be sufficiently determined by the record as it stands. The issue is therefore not properly raised here.

Finally, appellant raises a number of arguments attacking the application of the death penalty statute to his case and the statute's constitutionality. Having carefully reviewed each of these contentions, they are found to be without merit. Appellant's conviction and death sentence are therefore affirmed.

It is so ordered.

BOYD, C.J., and EHRLICH and SHAW, JJ., Concur
OVERTON, J., Concurs specially with an opinion

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

OVERTON, J., concurring specially.

Because this involves the "triggerman" in a contract killing, the death penalty is appropriate. I am concerned, however, that our system of justice has allowed Sweet, who instigated, planned, and directed this murder, to receive total immunity from prosecution for this murder.

An Appeal from the circuit Court in and for Highlands County,

E. Randolph Bentley, Judge - Case No. CR81-535

Barry Haight, Milton, Massachusetts; and Donald J. Ferguson, Coconut Grove, Florida,

for Appellant

Jim Smith, Attorney General; and Karla J. Staker and Robert J. Krauss, Assistant Attorneys General, Tampa, Florida

for Appellee

86-106

Supreme Court, U.S.
FILED
AUG 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. A-964

In the Supreme Court
of the United States

October Term, 1985

William Harold Kelley,
Petitioner,

-against-

The State of Florida,
Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Florida

PETITIONER'S REPLY BRIEF

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I. RESPONDENT FAILS TO MEET PETITIONER'S ARGUMENT THAT THE FLORIDA SUPREME COURT'S "VARIABLE ANALYSIS TEST" IS CONSTITUTIONALLY DEFECTIVE

The government's Response in Opposition ignores the significance of Petitioner's challenge to the Florida Supreme Court's "variable analysis test." This case presents the critical issue whether it is constitutionally permissible to deny an otherwise meritorious claim that critical evidence was destroyed, merely because the reviewing court can find no evidence of governmental bad faith. This Court's decisions in Brady and Agurs would clearly prevent such a result; they hold that the government's conduct is irrelevant to the court's analysis of the impact of the missing evidence at the defendant's trial. Cf. Brady v. Maryland, 373 U.S. 83, 87 (1963); United States v. Agurs, 427 U.S. 97, 110 (1976). In this case, however, the Florida court grounded

its decision on the alleged absence of governmental bad faith, concluding that "if even the slightest hint of prosecutorial misconduct was present in the case the result might well be different." Respondent glibly asserts on one hand that the Florida decision is "consistent" with Brady and Agurs, and then attempts on the other hand to defend the decision's emphasis on good faith by "noting" that this court's recent decision in California v. Trombetta, 104 S.Ct. 2528 (1984), also contained a discussion of governmental good faith. Respondent does not -- indeed can not -- explain how a decision which turns on a finding of governmental good faith can be "consistent" with this Court's insistence that "the moral culpability of the prosecutor" should not contribute to the court's ultimate decision, much less determine it. Agurs, 427 U.S. at 110.

The Response in Opposition demonstrates the need for a clarifying decision from this Court. It reflects precisely the kind of confusion about the role of governmental good or bad faith in a destruction of evidence analysis which requires authoritative resolution. States such as Florida are using Trombetta's passing discussion of governmental good faith to change fundamentally the substance of destruction of evidence analyses, ignoring the limits set by this Court in Brady and Agurs. This case presents an appropriate vehicle to resolve the confusion. Indeed, the difference between a correct and an incorrect test in this case is also the difference between life and death for Petitioner.

The Response in Opposition also asserts that Petitioner's challenge to the Florida Supreme Court's "variable analysis test" is not properly before this court because

Petitioner's "contention that the Florida Court applied an unconstitutionally stringent test was never asserted by Petitioner nor passed upon by the Florida Supreme Court." Opposition at 10. This argument is specious. Obviously, Petitioner could not ask the Florida court to "pass upon" the constitutionality of its legal reasoning before the court had issued its decision relying on that reasoning. The Supreme Court of Florida's analysis, legal reasoning, and selection of precedent could not be anticipated in advance; there were no lower court opinions in this case addressing the constitutional aspects of Petitioner's due process claim. At every level, from a pre-trial motion to dismiss the indictment through his appeal to the Florida Supreme Court, Petitioner asserted that he was denied his constitutional right to due process and was

unable fully to defend himself because the government had intentionally destroyed critical exculpatory evidence. Thus, Petitioner's due process claim was fully preserved and is properly before this court.[1]

The Response in Opposition attempts to undermine Petitioner's demonstration of the materiality of the destroyed evidence by noting that it was the state's exhibits against John Sweet which were destroyed and by asserting that Petitioner could readily have substituted unspecified "lab results" for the critical missing evidence. Opposition at 14 - 16. These assertions are grossly misleading. True, the state's exhibits against Sweet were

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[1]The government's reliance on Cardinale v. Louisiana, 394 U.S. 437 (1969) (Opposition at 10) is misplaced. In that case, this Court dismissed its writ for want of jurisdiction where no federal question had ever been raised prior to the filing of the Petition for Certiorari. Here, of course, Petitioner's constitutional claim has been raised and preserved throughout.

destroyed, and "the defense exhibits were still available...." Opposition at 14. But the interests of Petitioner and Sweet are in conflict; not only was Sweet the star witness against Petitioner, but Petitioner contends that the actual murderer may well have been Sweet. Consequently, Sweet's "defense" exhibits cannot be expected to assist Petitioner's defense. The government's exhibits however, and in particular the real evidence relating to the murder scene, would be highly relevant to proving Petitioner's innocence. While the government never contended that Sweet was at the murder scene, it did contend that Petitioner was. Evidence -- such as fingerprints and bloodstained objects-- that was merely tangential at Sweet's trial would have been vital in assisting Petitioner to prove that he was not at the scene.

The government blithely contends that "lab reports pertaining to the sheets" and the medical examiner's testimony provided Petitioner with "comparable evidence" to replace the missing evidentiary items, including the sheet. Opposition at 16. The contention is erroneous. Petitioner insisted at trial that because "Kelley" was seen shortly after the murder with no blood on his clothes, he could not have committed this very bloody crime. The state countered this assertion -- as it now concedes -- by contending "that the sheet was wrapped around the victim before he was stabbed to absorb the blood." Opposition at 15. Thus, the cut and bloodstained sheet's absorption potential was a central factual issue for both the defense and the prosecution. Yet the "lab tests" referred to by Respondent, the only ones performed before the sheet's destruction, did

no more than identify the blood type found on the sheet; they were completely irrelevant to the central dispute about whether the sheet could have absorbed the blood. Similarly, the medical examiner's testimony, which established that the victim's heart continued to pump for several minutes after the stabbing intensifies rather than obviates the need for the sheet itself. Opposition at 16. Did the blood spurt through the sheet or didn't it? No tests were performed analyzing the size and direction of the slits or the quantity of blood found on the sheet. Had the sheet been preserved, expert analysis and testimony could have answered this critical factual question. Without the sheet, each side could only ask the jury to engage in conjecture. Because the sheet was thus of such critical evidentiary importance, its materiality to Petitioner's defense cannot be denied, nor was there any

"comparable evidence" available to Petitioner after its destruction.

The government concedes that Petitioner was an active suspect in the case at the time the evidence was destroyed. Opposition at 2. Yet they also admit that he was given no notice or opportunity to challenge the destruction of all of the real evidence relating to the murder scene. Had anyone stopped to consider what impact the proposed destruction would have on any eventual trial of Petitioner, the exculpatory potential of items such as the sheet would have been obvious. Respondent quotes this court's language in Trombetta that, for destroyed evidence to be constitutionally material it must "possess an exculpatory value that was apparent before the evidence was destroyed." 104 S.Ct. at 2534. That phrase must mean an obvious exculpatory potential, since the

actual exculpatory value can never be known for certain before the trial and will depend in large measure on who the defendant is and the defense theory of the case. For example, fingerprints from the scene of a crime often possess exculpatory potential value at the time they are lifted but their actual value depends on the facts of the case. Where, as here, a bloodstained, knife-cut sheet and other items constitute the only evidence relating to the murder scene, it should be obvious that such items have the potential to exculpate a suspect such as Petitioner, because they are both the best and the only means to recreate, through expert analysis, critical aspects of the crime. By destroying this evidence, the state effectively deprived Petitioner of his ability to demonstrate that he could not have been the murderer.

II. RESPONDENT MISCONSTRUES PETITONER'S ARGUMENT THAT THE ADMISSION OF AN ALLEGED PRIOR CONSISTENT STATEMENT DEPRIVED PETITIONER OF DUE PROCESS AND THE RIGHT TO CONFRONTATION.

Petitioner was deprived of due process and the right to confrontation by the admission into evidence of the testimony of Abe Namia. Petition for Writ of Certiorari at 42 - 49. Sweet's testimony was the only evidence linking Petitioner to Maxcy's death. At trial, "[d]efense counsel clearly established an inference of improper motive to fabricate through its extensive cross-examination of Sweet concerning the laundry list of crimes for which he had been given immunity in return for his testimony against Kelley." Opinion of Florida Supreme Court, Petition for Writ of Certiorari at A-7. Namia's testimony -- that in 1967 Sweet told Namia of his and Kelley's involvement in Maxcy's death -- was offered to rebut this "clearly established ... inference." Despite

Sweet's vigorous in-court protests that he never told Namia anything of the sort, Sweet's 1967 statement was admitted for the truth of the matter asserted: that Petitioner had killed Maxcy. Petitioner had no opportunity to confront the declarant, since Sweet denied making the statement.

In Opposition, Respondent asserts, "this claim that there must be a foundation by eliciting the declarant's testimony that he made prior consistent statements is unsupported by any authority." Opposition at 19. Respondent misunderstands Petitioner's claim. The admission of Namia's statement violated the plain terms of the statute, which requires that the declarant be "subject to cross-examination concerning the statement" and that the statement be "consistent with [the declarant's] testimony." Fla. Stat. §90.801 (West 1979). Here, the statement was

inconsistent with the declarant's in-court testimony and the declarant was not subject to cross-examination -- because Sweet testified that he never made the statement. Numerous decisions reflect the necessity for consistency and the opportunity to cross-examine. See, e.g., United States v. West, 670 F.2d 675, 687 (7th Cir.), cert. denied, 457 U.S. 1124 (1982); United States v. Quinto, 582 F.2d 224, 234 (2d Cir. 1978). See also D. Louisell & C. Mueller, Federal Evidence §419 (1980) ("Not only claims of lack of memory and refusals to answer, but also denials of having made prior statements can effectively thwart cross-examination") (discussing Fed. R. Evid. 801(d)(1)).[2] And the constitutional right to

---

[2]Respondent argues that Namia's testimony was "substantially consistent" with Sweet's. Opposition at 21. Respondent overlooks the vital inconsistency in their testimony: whether Sweet told Namia what Namia said he did. It is this inconsistency that deprived Petitioner of an opportunity to confront.

confrontation has been repeatedly emphasized by this Court. E.g., Ohio v. Roberts, 448 U.S. 56 (1980); California v. Green, 399 U.S. 149 (1970).

III. RESPONDENT MISUNDERSTANDS PETITIONER'S ARGUMENT THAT THE IMPOSITION OF THE DEATH PENALTY IN THIS CASE IS UNCONSTITUTIONAL

Petitioner has asserted inter alia that the death penalty is imposed arbitrarily, on the basis of the victim's race. Petition for Writ of Certiorari at 50 - 53. The essence of this claim is currently before the Court. Hitchcock v. Wainwright, cert. granted, 106 S. Ct. 2888 (1986); McCleskey v. Kemp, cert. granted, 106 S.Ct. 3331 (1986). Although Respondent claims at one point that this issue was not properly preserved, Opposition at 24, Respondent concedes that Petitioner raised the issue "in his brief before the Florida Supreme Court." Opposition at 23. In fact, Petitioner presented this precise issue to the Florida Supreme Court and Respondent answered on the merits. Brief of Appellant, Part VI.B; Brief of Appellee, Part VI.G. Clearly, if there was no procedural bar to the Florida Supreme

Court's consideration of this issue, the issue was properly preserved, and there is no bar to this Court's consideration.

Petitioner has also argued that the imposition of the death penalty here is unconstitutional. Petition for Writ of Certiorari at 53 - 59. In this case, Florida's statutory scheme pyramided aggravating circumstances and thus enhanced the chance that the aggravating circumstances would outweigh mitigating circumstances. In addition, the statutory scheme permitted the sentencing judge to consider as an aggravating circumstance Petitioner's single prior felony conviction, despite the fact that the only thing known about this incident is that it occurred when Petitioner was sixteen years old and involved $114 and a six-pack of beer. Cf. Solem v. Helm, 463 U.S. 277, 296-97 (1983) (sentence of life imprisonment without

possibility of parole could not be supported by "relatively minor" felony convictions). Respondent's sole reply is that "Florida's aggravating circumstances have been repeatedly upheld by this Honorable Court." Opposition at 26. Respondent completely misses the thrust of Petitioner's challenge. Petitioner does not dispute the facial validity of the Florida statute but notes its unconstitutional application to the Petitioner in this case.

CONCLUSION

Petitioner who has vigorously asserted that he was not involved in the murder has been sentenced to death after the State deliberately and without notice to him destroyed crucial evidence that could have established his innocence. The State thus exploited the absence of the evidence at the trial and relied on inadmissible hearsay. The resulting conviction and death sentence of a defendant, whose only prior felony conviction was a juvenile offense involving a six-pack of beer, warrants review by this court.

For the above-stated reasons, as well as those set out in the Petition for a Writ of Certiorari, this Court should grant the Writ to decide the important questions of law raised here.

Respectfully submitted,

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